Term No. 193.
General No. 19654.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1905.

EDGAR M. MORSMAN,
Appellant,

vs.

SUMNER WALLACE, ET AL,
Appellees.

ARGUMENT FOR APPELLANT.

Appeal, From The United States Circuit Court Of Appeals For The Eighth Circuit.

W. W. MORSMAN,
For Appellant.

STATEMENT OF FACTS.

The appellant, Edgar M. Morsman, is the owner of 75 shares of the capital stock of the American National Bank of Omaha, Nebraska, and the decree appealed from affirms a decree of the Circuit Court for the District of Nebraska, which subjects him (and other shareholders) to individual liability, under Revised Statutes, Sec. 5151, for alleged debts of the bank, which appellant claims are not such obligations as the statute makes shareholders individually liable for. (Record, pp. 130-137-139).

Prior to and on the 21st day of December, 1895, the American National Bank and the Union National Bank, of Omaha, were each domiciled in the State of Nebraska, doing business in Omaha, and a citizen of that state. At that date the American National Bank was embarrassed, and there was an agreement in writing entered into between the two banks.

The *Board of Directors* of the American National, at a special meeting, adopted a resolution authorizing its officers to execute and carry out an agreement which recited the following:

"Whereas, the officers of this bank and the officers of the Union National Bank of Omaha, Nebraska, have negotiated and agreed upon the *sale* by this bank to the Union National Bank, of the busines and assets of this bank, on the terms and conditions embodied in the agreement of which the following is a copy, to-wit:

(Here follows a copy of the agreement. See Exhibit 7, Record, p. 255.)

By the agreement, the American National undertook to obligate itself as follows:

(1) To sell and assign to the Union National Bank its business, its cash on hand and cash items, its office furniture and fixtures and such of its bill receivable as the Union National should accept as cash and without recourse;

(2) To sustain and pay one half of the loss which should be sustained by the Union National by reason of its removal from its then place of business to the offices occupied by the American National on account of the unexpired term of the lease of the premises then occupied by it, and one half of the loss which the Union National should sustain in the sale of its own furniture and fixtures, the value of which was fixed at $3750.00.

(3) To *guarantee* the Union National against all loss on account of its assumption of the debts of the American National to its depositors and for bills payable, and in the execution of such guaranty ("and to this end" is the language used), to make and deliver to the Union National its three promissory notes in equal sums, in the aggregate equal to the sum of the liabilities of the American National assumed by the Union National in excess of the cash and other assets accepted as cash by the Union National; such notes to draw interest, to mature in one, two and three years, respectively, to be non-negotiable, and all to become due on non-payment of any one when due; and, "as further security", to sell to the Union National (the words are: "agrees to sell and assign, and does hereby sell and assign") *all* of its remaining assets, bills receivable, stocks, bonds, personal property, real estate, rights and interests therein, or liens thereon, with the understanding and agreement that the Union National Bank should have and hold said assets and property subject to the right of T. L. Kimball, or his successor, to collect and convert the same into cash for the purposes set forth in the contract.

The Union National undertook to bind itself:

(1) To take the furniture and fixtures of the American National at the sum of $3750.00, and to purchase (the words are: "agrees to purchase and does hereby purchase") the business, cash on hand, and such bills receivable of the American National as it (the Union National) should be willing to take as cash and without recourse;

(2) To assume all of the liabilities of the American National, to its depositors and on account of its bills payable;

(3) To liquidate the remainder of the assets of the American National (exclusive of the portion taken as cash) without any charge or expense therefor, except such court charges and attorney's fees as might be found necessary;

(4) That such liquidation should be conducted under the direction of Thomas L. Kimball (or such other person as should be agreed upon) on behalf of the stockholders of the American National, and that Kimball should represent the stockholders of the American National in snch liquidation, and receive, hold and use, the *proceeds* of such assets, as trustee, for both parties, and for the mutual protection of the rights of each, and that all necessary charges and attorney's fees attending such liquidation should be incurred under the direction of Kimball, or his successor. (Exhibit 1, Record p. 250).

The obligations of the parties are not set forth in the same order in the agreement, but the above is a correct analysis and orderly arrangement of them.

The agreement was executed Saturday evening, and on Monday morning the Union National had moved into the offices theretofore occupied by the American National, and the depositors balances were transferred from the books of the American National to the books of the Union National, to be paid by the latter as demanded in the course of business. The bills payable indebtedness of the American National was afterwards paid, and the Union National received all of the assets of the American National, which included cash and cash items, amounting to the sum of $46,167.79. None of the bills receivable of the American National were at the time taken as cash by the Union National, but it was found (December 23, 1895), that the liabilities assumed by the Union National exceeded the amount of assets

taken as cash, by the sum of $240,929.51, and thereupon, Thomas L. Kimball, as President, and Henry Wyman, as Cashier, executed in the name of the American National, three promissory notes, so-called, for the sum of $67,000.00 each, dated December 23, 1895, payable to the Union National, in the terms provided for in the agreement. (Record, pp. 252-3). They also gave to the Union National a "Cashier's Check" for $39,929.51. The three notes and the cashier's check, it will be observed, aggregate the sum of 240,929.51, the amount of the indebtedness which the Union National had assumed the payment of, in excess of the assets taken by it as cash.

The so-called Cashier's check was given as a matter of convenience, the parties not having, at the time, determined whether or not any of the bills receivable of the American National would be accepted by the Union National as cash.

Thomas L. Kimball retained a desk in the office room of which the Union National had taken possession pursuant to the agreement, employed Henry Wyman to assist him (p. 175) and proceeded with the liquidation of the "remaining" assets of the American National, which the Union National had taken and had agreed to liquidate without expense to the American National.

The Cashier's check for $39,929.51 was soon paid, partially by accepting bills receivable as cash, and the remainder in the course of the liquidation of the assets taken by the Union National for that purpose, which left $201,000 of the sum assumed by the Union National to be gotten out of the remaining assets, and which the American National by the agreement of December 21, 1895, guaranteed would be realized; that is, it guaranteed the Union National against loss. This sum of

$201,000 was represented by the three notes for $67,000 each, and is the alleged indebtedness of the American National for which it is sought, in this suit, to charge the shareholders individually.

The face, or book value of the remaining assets, was $451,731.03. The liquidation of them was conducted with such lack of judgment that, at the time of the filing of the bill, three years after the transfer to the Union National for liquidation, $371,765.00 remained unliquidated, and when finally sold, under the decretal order of the Circuit Court in this case, November 25, 1902, seven years after the transfer, after applying the proceeds, there remained unpaid (according to the final decree) of the three notes for $67,000.00 each, the sum of $194,466,36; that is to say: This liquidation of assets of the face value of $451,731.03, and which all parties believed to be more than sufficient to pay the three notes amounting to $201,000.00, in fact paid but $6,553.65 of the principal sum.

It is not material to the errors relied on to trace out in detail the disposition of the money actually collected in the course of that liquidation; but the record shows that at the time of taking the testimony there had been collected in cash, the sum of $127,744.15 (pp. 227-289), to which must be added the sum of $14,380.00 realized afterwards and before final decree (p. 125,) making the total cash realized $142,126.16; out of which, but $6,533.65 was paid on the principal sum of $201,000.00. The remainder of this large amount of cash realized was absorbed in the course of this protracted and obviously wasteful liquidation—wasteful, because it was conducted without discretion or judgment—which the Union National bound itself to do "without charge or expense" to the American National.

On February 25, 1896, at a special meeting of the stockholders of the American National, called for the purpose two months after the transfer of all the assets to the Union National pursuant to the agreement of December 21, 1895, a vote was had and a resolution was adopted, to place the Bank in liqudation under Revised Statutes Sections 5220 and 5221, and such further proceedings were taken as would have constituted a compliance with those sections, but for the agreement of December 21, 1895; but the American National did not, after, December, 21, 1895, have the control of or convert any of its assets.

The Union National transferred, on August 8, 1898 (p. 23), one of the three notes for $67,000.00 to the plaintiff, a citizen of New Hampshire, who filed the original bill against the American National and all of its shareholders, on August 18, 1899. The two remaining notes were retained by the Union National, which was also made a defendant.

Thomas L. Kimball was also made a defendant, and it was alleged that he held the remaining assets of the American National as trustee, to secure the payment of the three notes of $67,000.00 each, and that an accounting and decree for the sale of these remaining assets, was necessary.

Kimball died before final decree, and the circuit court, on the application of plaintiff, appointed James Burness his successor (p. 17).

An amended bill was filed February 17, 1900 (p.18). Plaintiff alleged that his suit was brought on behalf of himself and all other creditors of the American National, but it was not claimed there were any other creditors, excepting the Union National, holder of the two remaining notes for $67,000.00 each.

The plaintiff sought, by this amended bill, a decree ascertaining the amount due on the note held by him, and on the two notes held by the Union National; the enforcement of his lien upon the remaining assets of the American National, by a sale of them and application of the proceeds to the payment of the three notes for $67,000.00 each, and several judgments against the shareholders individually to make up any deficiency that should be found. So far, therefore, as the appellant is concerned, the suit is one to charge him with the payment of a pro rata proportion of the amount of the three notes remaining unpaid after sale and application of the proceeds of the remaining assets of the American National, as a debt of the American National for which shareholders are made liable by Revised Statutes, Sec. 5151.

It was alleged in the amended bill, that the American National had gone into voluntary liquidation under R. S. Sec. 5220, on the 14th day of January, 1896. (p. 25).

It was also alleged in the amended bill, that the shareholders of the American National were advised of its embarrassed condition, and that it was necessary to make the agreement of December 21, 1895; that they received and accepted the benefits of, and ratified and confirmed, the same, and thereby induced the Union National to pay the indebtedness of the American National by means of said agreement. (p. 24).

There was a prayer for a decree ascertaining the amount due to plaintiff on the note held by him, the names of the other creditors and the amounts due to each; that the decree ascertain and determine the names of all of the shareholders and the number of shares held by each; that it find and determine the amount due from, and for judgment against, each of them; and that

Burness make full report of the assets in his hands and abide the order of the court concerning the same (p. 29).

The appellant by his answer to the amended bill (Record, p. 34) admitted: the making of the agreement between the two banks of December 21, 1895; that the liabilities of the American National assumed by the Union National, exceeded the assets taken by the Union National as cash, by the sum of $201,000.00, and the making and delivery of the three promissory notes of $67,000.00 each, pursuant to and in performance of, said agreement of December 21, 1895.

Appellant denied that the assets of the American National which were not taken as cash by the Union National, were delivered to Thomas L. Kimball as trustee of the parties to the agreement of December 21, 1895, and averred that such assets were delivered to the possession of the Union National pursuant to that agreement; he denied that the shareholders of the American National, including himself, were advised of the embarrassed condition of the bank, and of the necessity of making the agreement of December 21, 1895; he denied that, with such knowledge, he had received and accepted the benefits of, and consented to, or ratified and confirmed, the same, and induced the Union National to pay the debts of the American National by said agreement; and he denied that the American National had gone into liquidation under the provisions of the Revised Statutes, Sec. 5220.

Appellant also plead affirmatively: the making of the agreement of December 21, 1895, as set forth above; the delivery of all the assets of the American National to the Union National, pursuant thereto; the ascertainment by the parties that the amount of the liabilities of

the American National, assumed by the Union National, was $240,929.51 in excess of the cash and assets taken as cash by the Union National; the making and delivery of the three notes for $67,000.00 each, and the Cashier's check for $39,929.51; that of the assets turned over to the Union National for liquidation, $371,765.00 (face value) remained in the possession of the Union National, and had not been liquidated or exhausted for the satisfaction of complainant's claim; and that the agreement of December 21, 1895, and the three promissory notes for the sum of $67,000.00 each, were *ultra vires* and void acts of the American National, and were not entered into or duly contracted in the ordinary course of its business and created no obligation for which appellant, as a shareholder, was individually liable under the acts of Congress.

The Union National answered as a defendant (August 2, 1901) setting up its claim as the owner of two of the notes for $67,000.00 each (p. 118).

After the case had been argued and submitted the circuit court made an interlocutory decree directing Burness to sell the remaining assets of the American National, which was done, the Union National being the purchaser (p. 123). This sale was confirmed and Burness was discharged (p. 124). A final decree was then entered by the circuit court, which adjudged the appellant to pay to complainant, Sumner Wallace, the sum of $1,744.50 (p. 137) and to the Union National the sum of $5,477.75 (p. 138) and costs, and execution was awarded (p. 139).

This decree was affirmed by the court of appeals.

Appellant prayed an appeal (p. 422), which was allowed (p. 426), and assigned errors (p. 423), and now relies upon each of the following errors alleged:

ASSIGNMENT OF ERRORS.

(1) The circuit court of appeals erred in its decree affirming the decree and judgment of the circuit court for the district of Nebraska; that is to say, in holding that the suit is one to wind up the affairs of a national bank and a suit arising under the laws of the United States of which the circuit court had jurisdiction.

(2) The circuit court of appeals erred in its interpretation of the contract of December 21, 1895, between the American National Bank and the Union National Bank and in holding the same to be merely a contract by which, "the Union National Bank assumed the payment of the liabilities of the American National to its depositors and on account of bills payable, and in return was to receive its cash, cash items and such bills receiveable as the former was willing to accept at par and without recourse. The difference between the aggregate of the amounts so received and the gross amount of liabilities assumed was to be represented by three non-negotiable promissory notes of the American National, the payment of which was to be secured by a pledge of all of its remaining assets to Thomas L. Kimball as trustee", which erroneous interpretation was material to the final conclusion of the court.

(3) The circuit court of appeals erred in holding that the contract of December 21, 1895, between the American National Bank and the Union National Bank, had been ratified by the shareholders of the American National Bank, and that the individual liability of shareholders under section 5151 of the Revised Statutes of the United States, might, therefore, be enforced.

(4) The circuit court of appeals erred in holding that the complainant—Sumner Wallace and Union National Bank could go behind the contract of December 21, 1895, and that their claims were, in equity, for the "contracts, debts and engagements" of the American National Bank, for which shareholders are made individually liable, under section 5151 of the Revised Statutes.

BRIEF.

1.

The Circuit Court had no jurisdiction for the following reasons:

(1) Although plaintiff is a citizen of the state of New Hampshire, and the defendants are citizens of other states, the suit is brought by plaintiff, as assignee, to recover the "contents" of a *chose in action*—to enforce the agreement between the two banks, each being a citizen of Nebraska.

(2) Section 2 of the Act of June 30, 1876, Comp. Stat. 3509, which conferred jurisdiction of a suit to enforce the individual liability of shareholders of a national bank which had gone into voluntary liquidation pursuant to the authority conferred by Section 5220, R. S. is *repealed* by Section 6 of the Act of August 13, 1888; and

The case is not brought within Section 2 of the Act of June 30, 1876, even if that section be still in force, because it is shown by the evidence that the proceedings of the American National, ostensibly taken pursuant to

section 5220, were a mere form, taken without any intention to exercise the powers conferred by that section, and long after the bank had, by the agreement of December 21, 1895, placed it beyond its power to liquidate its own affairs, and had undertaken to delegate that power to the Union National Bank.

(3) No law in force when the bill was filed confers jurisdiction of a suit against a national bank which is not brought by the United States, or by the direction of an officer or agent thereof, excepting Section 1 of the Judiciary Act of August 13, 1888.

Whether we consider the case as one against the American National, to which the relief sought against shareholders is ancillary, or *vice versa*, the jurisdiction must be found, if it exists at all, in that section and in the provision thereof conferring jurisdiction in suits "arising under" a law of the United States.

The American National Bank was a necessary party.

Richmond vs. Irons. 121 U. S. 27-48.
King vs. Pomeroy, 58 C. C. A. 209; 121 Fed. 287-295.
Swan Land Co. vs. Frank, 148 U. S. 603.

In order to invoke the jurisdiction granted of suits arising under a federal statute, it is necessary to show, by proper averments *in the bill*, that the matter to be litigated is a federal question.

Metcalf vs. Watertown, 128 U. S. 586.
Colorado &c. Co. vs. Turck, 150 U. S. 138.
Tennessee vs. Union &c. Bank, 152 U. S. 454.
Defiance Water Co. vs Defiance, 191 U. S. 184.
Arbuckle vs. Blackburn, 191 U. S. 413.

And the averments of the bill must show that the

issue tendered by it involves, really and substantially, a *dispute or controversy* as to the effect or construction of a law of the United States, upon the determination of which the right to relief depends.

It is not sufficient that the bill seeks to enforce a *right* created by federal statute. It must show a controversy or dispute "arising under", that is, involving and making it necessary for the court to determine the effect or construction of a federal statute.

Goldwashing &c. Co. vs. Keys, 96 U. S. 199.
Cook vs. Avery, 147 U. S. 375-384
Filhiol vs. Maurice, 185 U. S. 108-111.
Filhiol vs. Torney, 194 U. S. 356.
Defiance Water Co. vs. Defiance, 191 U. S. 184-190.
Arbuckle vs. Blackburn, 191 U. S. 405-413.

The amended bill is entirely deficient in these respects. It shows no federal question against either the American National or the appellant.

II.

The agreement of December 21, 1895, between the two banks, whereby the American National guaranteed the Union National against loss, and the so-called promissory notes for $67,000.00 each, were *ultra vires* the American National, because a national bank has no power to delegate, or to renounce, its own functions and power to voluntarily liquidate its own affairs. The power given by the statute to the national banks to go into voluntarily liquidation and be closed, must be exer-

cised by their own directors and officers and cannot be delegated.

But if the agreement of the American National be not held *ultra vires* in the absolute sense, it was, at least, not "duly contracted in the ordinary course of its business", by that bank.

In either case the individual liability of the shareholders, created by the statute, cannot be enforced for the satisfaction of the obligation. Such obligations are not contemplated by the statute which fixes the individual liability of shareholders.

Richmond vs. Irons, 121 U. S. 27.
Schrader vs. Manufacturer's Bank, 133 U. S. 67.
Ward vs. Joslyn, 186 U. S. 142.
California Bank vs. Kennedy, 167 U. S. 362-6.
Concord Bank vs. Hawkins, 174 U. S. 366.
McCormick vs. Market Bank, 165 U. S. 538.
Central Transportation Co. vs. Pullman Co. 139 U. S. 24.

III.

There is not, in this case, any principle of equity which entitles the plaintiff, or Union National, to be subrogated to the rights of the depositors and bills payable creditors, whose claims were assumed by the Union National; nor is the bill framed to tender such an issue. There is no averment of facts showing that a single one of such creditors could have enforced the individual liability of shareholders.

The Union National was a volunteer. It was not

required to pay, by any prior obligation or for the protection of some interest or right of its own. It assumed and paid the debts of the American National upon an original agreement, for a new consideration, and because it was believed to be a profitable venture. This creates no right to equitable subrogation.

Aetna Life Co. vs. Middleport, 124 U. S. 534.
Wood vs. Guaranty Co. 128 U. S. 416.
Railway Co. vs. Wortendyke, 27 N. J. Eq. 658.
Sanford vs. McLane, 3 Paige 122; 23 Am. Dec. 773-6.

IV.

The appellant is not bound by either estoppel or ratification.

Ratification by a shareholder of, or acquiescence by him in, the *ultra vires* contract of the corporation, does not enlarge the individual liability of the shareholder, created and limited by statute. He does not, by consenting that the corporation be bound, enlarge his own liability.

Ward vs. Joslyn, 186 U. S. 142.

But the agreement, being *ultra vires*, was not the subject of ratification.

McCormick vs. Market Bank, 165 U. S. 538.
Central Transportation Co. vs. Pullman Co. 139 U. S. 24-50.
California Bank vs. Kennedy, 167 U. S. 362.
Thomas vs. Railroad Co. 101 U. S. 71-82.
Oregon Ry. Co. vs Oregonian Ry. Co., 130 U. S. 1-22.
Ward vs. Joslyn, 186 U. S. 142-151.

ARGUMENT.

I.

This court has jurisdiction on appeal.

The jurisdiction of this court is found in Section 6 of the Act of March 3, 1891, creating the Circuit Courts of Appeals.

The case is not one which, on the merits, could, by the provisions of Section 5 of that act, have been brought to this court directly by appeal.

The plaintiff undertook by his bill to found the jurisdiction of the Circuit Court, not only upon diverse citizenship, but also upon Section 2 of the Act of June 30, 1876; also upon the ground that the case was one arising under a law of the United States, the jurisdiction being sustained by the Court of Appeals on the last ground. The case was not one arising under the patent laws, the revenue laws, the criminal laws, or in admiralty. The case, therefore, is one in which the decree of the Court of Appeals is not, by the provisions of Section 6 of the Act of 1891, made final, and in all such "cases", where the matter in controversy exceeds the sum of One Thousand Dollars, besides costs, Section 6 of that act creates a right of appeal to this court from the Court of Appeals, and an appeal brings the whole case to this court, notwithstanding the question of jurisdiction of the Circuit Court might, under Section 5 the Act of 1891, have been brought alone to this court directly from the Circuit Court.

It is fundamental that this court will always ex-

amine into its own jurisdiction and that of the court in which Federal jurisdiction was first invoked.

Defiance Water Company vs. Defiance 191 U. S. 184.

Continental National Bank vs. Buford, 191 U. S. 119.

American Sugar Refining Company vs. New Orleans, 181 U. S. 277-281.

Mansfield &c. Co. vs. Swan, 111 U. S. 379-382.

Northern Pacific Ry. Co. vs. Soderberg, 188 U.S. 526.

Metcalf vs. Watertown, 128 U. S. 586.

II.

The Circuit Court had no jurisdiction.

An opinion by the Circuit Court, announced before the filing of the amended bill, is in the record at page 10.

The opinion of the Court of Appeals is found at page 391.

(1) The jurisdiction of the Circuit Court on the ground of diverse citizenship was, clearly, not established. Plaintiff, Sumner Wallace, was a citizen of New Hampshire, and the defendants were all citizens of other states; but plaintiff sued as assignee of a non-negotiable chose in action, to recover the "contents" thereof. The paper was a non-negotiable contract between the Union National Bank (plaintiff's assignor) and the American National Bank, each of which was a citizen of Nebraska, and appellant and nearly all of the defendants were citizens of Nebraska.

The Court of Appeals *denied* this ground of jurisdiction. (Record, p. 393).

(2) But plaintiff also claimed that jurisdiction was devolved upon the Circuit Court by Section 2 of the Act of June 30, 1876. 19 Stat 63; Comp. Stat. 3509. That section is as follows:

> "Sec. 2. That when any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section five thousand one hundred and fifty-one of said statutes, may be enforced by any creditor of such association, by bill in equity in the nature of a creditor's bill, brought by such creditor on behalf of himself and all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established."

The Court of Appeals reached the conclusion, in its opinion, that this section is in force, and that, so far as this suit may be considered as one to enforce the liability of shareholders, the jurisdiction is sustained by this section; and, in the opinion, the following cases are cited to show *judicial recognition* that the section is still in force: *Commercial National Bank vs. Weinhard*, 192 U. S. 243-250; *Donald vs. Thompson*, 184 U. S. 71-75; *King vs. Pomeroy*, 121 Fed. 287; 58 C. C. A. 209; *Williamson vs. Bank*, 115 Fed. 793: 52 C. C. A. 1.

But an examination of these cases will show that no question was raised in either, and that it was not considered in either, whether this section was or was not in force, and I have not found any case in which the question has been raised or considered.

It was, of course, the purpose of this section to give the Circuit Court, as a court "having original

jurisdiction in equity", jurisdiction of this specific remedy for the enforcement of the individual liability of shareholders of national banks; but, I respectfully think, this provision was repealed by section 6 of the judiciary act of March 3, 1887, as corrected August 13, 1888; 25 Stat. 433; Comp. Stat. 514.

It was the purpose of this general judiciary act to *revise* prior laws, and to define *generally* jurisdiction of the Circuit Courts. One purpose, as declared in the title, was to "determine" the jurisdiction of such courts. The Act purports to define the whole jurisdiction of these courts, excepting as existing provisions conferring jurisdiction in *special cases* are expressly saved from the repealing clause.

Section 5 of this Act is as follows:

> "Sec. 5. That nothing in this act shall be held, deemed or construed, to repeal or affect any jurisdiction or right mentioned either in sections six hundred and forty-one, or in six hundred and forty-two, or in six hundred and forty-three, or in seven hundred and twenty-two or in title twenty-four of the Revised Statutes of the United States, or mentioned in section eight of the act of Congress of which this act is an amendment, or in the act of Congress approved March first eighteen hundred and seventy-five, entitled 'An act to protect all citizens in their civil and legal rights.' "

It will be seen that, by this section, the act points out, specifically, the existing laws conferring jurisdiction upon the Circuit Courts in particular cases, which it is provided shall *not* be repealed or affected by any of its provisions. But Section 2 of the Act of June 30, 1876, is not mentioned in, and is, therefore, excluded from, this saving section.

Section 6 of the Act is as follows:

Sec. 6. That the last paragraph of section 5 of the act of Congress approved March third, eighteen hundred and seventy-five, entitled 'An act to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of causes from state courts, and for other purposes', and section six hundred and forty of the Revised Statutes, and all laws and parts of laws in conflict with the provisions of this act, be and the same are hereby repealed:

Provided, that this act shall not affect the jurisdiction over or the disposition of any suit removed from the Court of any state, or suit commenced in any court of the United States, before the passage hereof, except as otherwise expressly provided in this act."

It will now be seen that Section 2 of the Act of June 30, 1876, is not merely excluded from the saving provisions of section 5, but, by the repealing provisions of section 6, all inconsistent laws are expressly repealed; and it is too plain and elementary for controversy, that, having expressly enumerated the provisions conferring jurisdiction in special cases which are to be preserved and saved from repeal, all other such special provisions are repealed—if they are in conflict with the provisions of the Act of August 13, 1888.

Is Section 2 of the Act of June 30, 1876, in conflict with the provisions of the Act of August 13, 1888?

That Section conferred jurisdiction, notwithstanding the suit is not (1) one "arising under" the constitution or laws of the United States or treaties made under their authority; or (2) one in which there is a controversy between citizens of different states; or (3) one in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars; or (4) one in which there is a controversy between citizens of the same state claiming lands under

grants from different states; or (5) one in which there is a controversy between citizens of a state and foreign states, citizens or subjects. But by Section 1 of the Act of 1888, one (or more) of these facts is essential to the jurisdiction in *every* civil case—excepting those special cases in which the jurisdiction is expressly preserved by the reservations contained in section 4 (to be noticed further on) and section 5 quoted above.

The conflict, therefore, is clear and certain, and, reading sections 5 and 6 together, there seems to be no escape from the conclusion that the intention of Congress was to repeal *all* jurisdiction not expressly saved by that act, and that section 2 of the act of June 30, 1876, not being so saved, is repealed by section 6, of the act of August 13, 1888.

(3) There is also abundant reason for the contention that Section 2 of the Act of June 30, 1876, is not applicable to the case at bar, even if it be still in force.

That section is, by its terms, limited to cases in which a "national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty", of the Revised Statutes. This prerequsite is a fact which must, if in issue, be established by evidence. This issue was raised by the answer, and the evidence shows that the American National had not, in fact, gone into liquidation under the provisions of section 5220. The evidence shows, it is true, that the association, two months after the assets had been turned over to the Union National, went through the *form* of exercising the power conferred by section 5220, and taking the steps required by section 5221; *but it was a mere form.* Mr. Wyman, who had been the cashier of the American National, and who

was employed by Kimball to assist in liquidating the assets after the transfer of them to the Union National under the agreement of December 21, 1895, testified (commencing at page 175 of the record), as follows:

"Q. Then those notes were given to the Union National for the purpose of off-setting liabilities of the American National Bank which the Union National Bank had assumed?

A. Yes sir.

Q. And neither you nor any of the officers of the American National Bank or the Union National Bank, at the time, expected that the American National Bank would have to pay anything to the Union National Bank under the contract of December 21, 1895, did they?

A. We expected the assets to pay that indebtedness.

Q. And the assets turned over to the Union National Bank largely exceeded the amount of these three notes at their face value?

A. Yes sir.

Q. You were employed by Mr. Kimball, were you not, acting in his capacity as trustee as he is designated in that contract of December 21, 1894?

A. Yes sir.

Q. And he paid you for your services?

A. Yes sir.

Q. So that you were representing him in the collection of the assets of the American National Bank which were turned over to the Union National Bank?

A. Yes sir.

Q. At the time of the passage of the resolution of the stockholders, directing the directors of the American National Bank to take steps looking to the liquidation of the American National Bank, and the subsequent proceedings of the American National Bank, ostensibly for its voluntary liquidation, the American National Bank had no assets had it?

A. No sir.

Q. And its liabilities had been assumed by the Union National Bank?

A. Yes sir.

Q. Well, what was then done by the American National Bank, its directors or officers, in the way of liquidating the business of the Bank?

A. We went through the form prescribed by the National banking law.

Q. Passed the necessary resolutions?

A. Yes sir.

Q. And gave the notices?

A. Yes sir.

Q. But in fact there was nothing to liquidate, was there?

A. No sir.

Q. It was a mere form?

A. We went through the form, that was all, yes sir.

The association had bonds deposited to the amount of $50,000.00 to secure circulation amounting to $45,000.00 (p. 182). The bonds, including the premium, were worth about $9,000.00 more than the amount necessary to redeem the circulation, but the comptroller could not recognize the agreement of December 21,1895, and there was no provision of law under which the circulation could be redeemed and the bonds withdrawn and sold, excepting the provision of Sec. 5222 R. S., applicable to cases of voluntary liquidation under Sec. 5220. It was, therefore, thought that such liquidation was "required by law", and a resolution was passed (p. 261) instructing the directors to "take action looking to the liquidation required by law", and pursuant thereto a resolution was passed February 25, 1896, that the bank "be placed in voluntary liquidation under the provisions of Sections 5220 and 5221 U. S. Revised Statutes." (p. 264). The sole purpose of this action seems to have been to procure the surrender and sale of the bonds deposited to secure circulation, in order that the $9,000.00 in excess of what was necessary to redeem the

circulation, might be turned over to the Union National, pursuant to the agreement of December 21, 1895, and nothing more than was necessary to accomplish this purpose was done.

When Congress passed Section 5220 and 5221, it was the intention to confer the power and provide the method by which these associations might liquidate their own affairs through their own officers and directors, the association retaining control not only of its property and assets, but of its officers and directors. Congress conferred this power upon a National Bank Association in order that it might be, in good faith and actually, exercised by its own officers in administering what, under such conditions, becomes a trust fund for the benefit of creditors and shareholders, of which the directors and officers are trustees. This power was not conferred upon an association which had renounced or abdicated all of its functions and which no longer contemplated the exercise of its powers, not even the power to voluntarily liquidate, and which had transferred the whole of its assets so that it was powerless to itself carry on liquidation; nor was it contemplated that an association which had so divested itself of all but a legal existence should, by mere pretense of exercising this power, affect important rights, or that it should thereby determine the jurisdiction of courts.

The evidence shows that it was long after the making of the agreement of December 21, 1895, and the delivery of all its assests by the American National to the Union National, pursuant thereto, that the first step in this pretended liquidation was taken, at a special meeting of the directors; that the association did not contemplate any liquidation by the exercise of its own powers and through its own officers, but it had surrendered the

whole of its assests, then constituting a trust fund for the benefit of the creditors and shareholders, to the Union National, to whom, with Kimball, as agent for *both* parties, it had confided the administration of the trust without any limitation whatever upon the powers of either. The American National was so far from, in fact, intending liquidation and the exercise of its own powers, under sections 5220 and 5221, that it had, by the agreement and the transfer of its assests, precluded, so far as was within its power, the possibility of doing so. The association had completely lost the control of its assests and all power to liquidate them through its own board of directors and officers, because, although Kimball, its President, was designated in the agreement of December 21, 1895, as trustee of the proceeds of the assests, for both parties to the agreement, and it was provided that the liquidation should be conducted under his direction on behalf of the stockholders of the American National, it was also agreed that the Union National should liquidate the assests, and that for that purpose, as well as to secure the Union National against loss by its assumption of liabilities, the assests should be, and they were in fact, transferred to the Union National. The substance of the agreement was, that the assets of the American National were sold and assigned, (the words are: "Agrees to sell and assign and does hereby sell and assign"), as security to, and to be liquidated by, the Union National, but that the liquidation should be carried on under the direction of Kimball.

Having *agreed* with the Union National that it should conduct the liquidation under the direction of Kimball, the American National had no more control over its assets or the liquidation of them than it would have had if Kimball had not been named. It could not, by any ac-

tion of its directors or shareholders, remove or direct Kimball without the consent of the Union National. It gave to the Union National and Kimball an absolute and unlimited discretion. All power to itself liquidate the assets, or control the liquidation, was completely renounced and completely vested in the Union National and Kimball. If the American National had appointed Kimball its own agent to liquidate its assets in its own behalf, it would have retained and might have exercised the usual power and control which a principal may exercise over his agent. But when, by agreement with the Union National, which had acquired an important interest in the assets, Kimball was designated, without reservation or limitation of his power, to direct the liquidation, the Union National had the same right to insist upon that part of the agreement that it had to insist upon any other part. The mere fact that Kimball was the President of the American National is not important. This agreement did not provide for the exercise of his powers as President of the association, but renounced in his favor, (in conjunction with the Union National) all of the powers of the American National to control and liquidate the assets through its own officers, directors and shareholders, exercising their proper functions.

Can a mere vote of shareholders to go into liquidation under the provisions of section 5220, not meant to be carried out and impossible to be carried out in fact, create a case under section 2 of the Act of June 30, 1876? I do not find any case in which this questien has been considered and I submit that the language of the section cannot be enlarged to cover the case at bar as it stands upon the undisputed facts.

In order to bring the case within the obvious purpose, of section 2 of the Act of June 30, 1876, the asso-

ciation must, I submit, have gone into liquidation, in fact, and actually, intending to avail itself of the power given to voluntarily liquidate its own affairs, pursuant to section 5220, by its own proper officers, under the direction and control of its Board of directors.

(4) The court of Appeals did not, however, place full reliance, in its opinion, upon section 2 of the Act of June 30, 1876, for the jurisdiction, by the Circuit Court, of this suit. It found the jurisdiction more satisfactorily provided for by the judiciary act of August 13, 1888, and held that the suit was, (1) a case for "winding up the affairs" of a national bank within the provisions of section 4, and also, (2) a suit arising under the laws of the United States within section 1, of that act.

The suit seeks to enforce two remedies. The assets of the American National had been pledged by the agreement of December 21, 1895, as security for the promissory note held by plaintiff, and two other like notes held by the Union National. The assets were, so far as they had not been converted (at the time of the commencement of the suit) in the possession of the Union National, and, with Kimball, that bank was invested with power, and obligated by the agreement, to liquidate the whole, apply the proceeds to the payment of these notes, and account for any surplus. The plaintiff claimed a lien on the assets. He sought in this suit the enenforcement of his lien by sale of the assets, and a judgment against the American National Bank for such sum as should remain unsatisfied from the proceeds of the sale—that is, a judicial ascertainment of the debts and liabilities of the American National; a judicial determination of the necessity for enforcing, and the extent to which it was necessary to enforce, the individual liability of shareholders in order to satisfy the indebtedness of the asso-

ciation as it should be ascertained after a sale of the assets of the bank; and, several judgments against the shareholders. For this purpose he made the American National and Kimball parties defendant, as well as all of the shareholders, and the decree of the Circuit Court determined these questions and granted the relief.

As the liability of the shareholders is, by the terms of Section 5152, R. S., declared to be "equally and ratably, and not one for another," the judical determination of the amount of the liabilities, and the necessity for enforcing, and the extent to which it was necessary to enforce, the individual liability of shareholders, was a prerequisite to any judgment fixing liability upon them. It was necessary to determine: (1.) that there was an unsatisfied indebtedness due from the bank to complainant and others before it was possible to say there was *any* liability, and this involved the sale and application of the proceeds of the assets; and (2) the amount of such indebtedness, the identity of each creditor and the amount of his claim, and the number of shares held by each shareholder, before it was possible to determine what rate of liability would fall upon each.

In *Richmond vs. Irons*, 121 U. S. 27–48, it was said:

> "As all the shareholders were bound in that way (equally and ratably) to the creditors, any proceeding to enforce this liability must be such as, from its nature, would enable the court to ascertain for what the shareholders ought to be made liable, to whom, and in what proportion as respects each share."

In *King vs. Pomeroy*, 58 C. C. A. 209; 121 Fed. 287-295, the court, approving *Williamson vs. American Bank*, 52 C. C. A. 1; 115 Fed. 793, so far as that case held the insolvent bank was a necessary party to such determination, said:

"The ascertainment of the debts and liabilities of the bank, and the judicial determination of the necessity and the requisite extent of the enforcement of the stockholders liability, are essential pre-requisites to the collection of the amounts owing by them, and the insolvent bank is a necessary party to these adjudications."

The American National was an indispensable party.

Swan Land & Cattle Company vs. Frank, 148 U. S, 603.

If, therefore, this suit be one against the American National Bank to wind up its affairs (which seems to have been the view taken by the Court of Appeals) in which the relief sought against the individual shareholders is ancillary, still, if the Circuit Court had no jurisdiction to determine these primary and pre-requisite questions, it would have no jurisdiction to determine any.

It is now necessary to inquire whether the suit was one of which the Circuit Court had jurisdiction by virtue of anything contained in Section 4 of the Act of August 13, 1888. That section is as follows:

"Sec. 4: That all national banking associations established under the laws of the United States shall, for the purpose of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the state in which they are, respectively, located; in such cases the Circuit and District Courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state.

The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States, or by direction of any officer thereof, or cases for winding up the affairs of any such bank."

The first provision of this section, it will be observed, does not *confer* any jurisdiction whatever in suits

against national banks. It declares their citizenship and *denies* jurisdiction to the Circuit Courts, "other than such as they would have in cases between *individual* citizens of the same state."

Nor does the second provision *confer* any jurisdiction. It merely restricts the operation of the first provision; that is, it shall not "affect the jurisdiction" of the courts of the United States in cases commenced by the United States, or by direction of any officer thereof, or cases for winding up the affairs of any such bank. In these excepted cases, whatever jurisdiction is elsewhere given is merely *saved* by this section, and we must look elsewhere to find what jurisdiction is thus preserved. It is erroneously assumed in the opinion of the Court of Appeals that this section *confers* jurisdiction in cases for winding up.

Prior to 1882 the Circuit Court had jurisdiction of *all* suits brought by or against any national bank. This jurisdiction was based solely upon the *Federal origin* of these associations; but it gave rise to much complaint, and by the Act of July 12, 1882, 22 Stat. 162; Comp. Stat. 3458, the following was enacted:

> "Sec. 4. * * * * *
> *Provided, however*, that the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any laws of the United States which do, or might do, banking business where such national banking associations may be doing business when such suits may be begun. And all laws and parts of laws of the United States, inconsistent with this proviso be, and the same are, hereby repealed."

Congress was not willing to withdraw from the

Circuit Courts all jurisdiction based upon the Federal origin of the banks, but by this provision it cut that jurisdiction down until nothing remained but suits *between* them and the United states, or its officers and agents. In no other cases whatever was there any jurisdiction in the Circuit Courts, because of the Federal origin of the banks, at the time of the enactment of the Judiciary Act of August 13, 1888, and it it is clear that it was then not the intention of Congress to entirely repeal the jurisdiction founded upon Federal origin, but to further *restrict* it, and by section 4 of that act, the jurisdiction was still further restricted to cases *commenced* by the United States, or by direction of any officer thereof, or cases for winding up the affairs of any such bank. But, as already pointed out, Congress was not, in this section, conferring any jurisdiction, nor had it ever conferred jurisdiction, in terms, in cases for "winding up" the affairs of a national bank. It was merely *saving* jurisdiction based upon the Federal origin of the banks, and in order to find what jurisdiction was thus saved, we must consider the proviso of section 4 of the Act of 1882, quoted above. Reading that provision with the restriction contained in section 4 of the Judiciary Act of August 13, 1888, no suit against a national bank is within the jurisdiction of a Circuit Court *if not commenced by the United States, or by an officer or agent of the United States*—unless the controversy be one of which the court would have jurisdiction if it were between individuals of the same citizenship. It is obvious, therefore, that the mere fact that this suit is one for winding up the affairs of a national bank (assuming it to be such) does not help the jurisdiction at all, because it was not commenced by an officer or agent of the United States.

It is clear that it was the purpose of Section 4 of

the Act of August 13, 1888, to save whatever jurisdiction then existed in cases "for winding up the affairs" of national banks. But to what provision conferring jurisdiction does it refer, if it be not the provision for jurisdiction of suits commenced by officers or *agents* of the United States?

It will be observed that, by the *proviso* to Section 4 of the act of 1882 (quoted above), the jurisdiction for suits by and against the national banks resting upon their Federal origin was cut down to suits *between* them and the United States or its officers and agents. Under the statutes theretofore enacted, the decisions of this court and the reservation contained in the proviso, *any* suit brought by an agent of the United States though he was not an officer of the United States, against a national bank, or by a national bank against such an agent, was within the jurisdiction of the Circuit Courts.

Now, by Sec. 4 of the act of 1888 (quoted above), this jurisdiction was again delimited, saving the jurisdiction only for suits *commenced* by the United States, or by direction of any officer thereof, or cases for winding up the affairs of any such bank, the word "agent" being now omitted and the words "or cases for winding up the affairs of any such bank" being substituted. A suit commenced by an agent of the United States against a national bank was not left within the jurisdiction of the Circuit Court; but suits for winding up were—*so far as pre-existing laws conferred such jurisdiction.* But pre-existing laws conferred such jurisdiction only when the suit was between "an officer or agent" of the United States and a national bank. It follows logically that the provision of Sec. 4 of the act of 1888 saving the jurisdiction for cases in winding up, merely extends to cases commenced by an agent of the United States. Suits

against a national bank commenced by the United States, or by direction of any officer thereof, and cases commenced by an agent of the United States for winding up the affairs of any such bank, are within the jurisdiction of the Circuit Court. No other suits are, unless they fall within some of the provisions of Sec. 1 of the act of August 13, 1888.

In *Petri vs. Commercial Bank*, 142 U. S. 644-649, it is said:

> "So far as the mere source of its incorporation rendered the suits to which a national bank might be a party, cognizable by the Circuit Courts, that was taken away, but the jurisdiction which those courts might exercise in such suits, when arising between citizens of different states, or under the constitution or laws of the United States, except in that respect, remains unchanged."

It is not denied that the jurisdiction in cases arising under the laws of the United States embraces suits against national banks, *when the bill sets forth a case of that character.* But a case, even if it be "for winding up the affairs" of a national bank, is not, for that reason alone, one arising under the laws of the United States.

It was formerly held by this court that a suit against a national bank, as in the case of other Federal corporations, was necessarily a suit arising under the laws of the United States, because "they were created by Congress and could acquire no right, make no contract and bring no suit, which was not authorized by a law of the United States."

Petri vs. Bank, 142 U. S; 644-648.

But the fact that these associations exist by virtue of, and derive all of their powers from, the laws of the United States, is now, by the acts of Congress, eliminated from consideration in determining the question of

jurisdiction, and the question must be solved by applying the same test, excepting in cases commenced by the United States, or by the direction of an officer thereof, or by an agent of the United States, for winding up, as determine the question in suits between in dividuals of the same citizenship.

The argument is now reduced to a single question—Is the case a suit arising under the laws of the United States, in the sense of Section 1 of the Judiciary Act of August 13, 1888?

It is not of that character merely because plaintiff seeks (in addition to the obligation of the bank under the agreement of December 21, 1895), to enforce the individual liability of shareholders—created by a law of the United States.

This question must be determined upon the averments of the bill, and in order to invoke the jurisdiction it must appear from those averments that the case presented is one "arising under" the laws of the United States. It is the plaintiff's statement of his own case which must satisfy the test. The Federal question must there appear and be shown to be involved. No issue tendered by a defendant which raises a question under the laws of the United states will cure a want of jurisdiction at the time of filing a bill.

Metcalf vs. Watertown, 128 U. S. 586.

Colorado Central Mining Co. vs. Turck, 150 U. S. 138.

Tennessee vs. Union & Planters Bank, 152 U. S. 454.

Defiance Water Company vs. Defiance, 191 U. S. 184.

Arbuckle vs. Blackburn, 191 U. S. 413.

And the averments of the bill must show that the case presented, really and substantially, involves a *dispute or controversy* as to the *effect or construction* of a law of the United States, *upon the determination of which the result depends.*

In *Gold Washing &c. Co. vs. Keyes*, 96 U. S. 199, the suit was instituted in the state court to enjoin the Gold Washing Company from depositing the tailings and debris from its mines in the channel of a river by which they were carried upon the land of Keyes. The company removed the case to the Circuit Court and in the petition alleged that it claimed the right to deposit the tailings and debris as it was doing under certain acts of Congress, specifying them in the petition, and then alleged that the "said action arises under, and its determination will necessarily involve and require the construction of, the laws of the United States", *etc.* It was said in the opinion (page 203):

> "A cause can not be removed from the state court simply because, in the progress of the litigation, it may become necessary to give a construction to the constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the constitution or laws upon the facts involved."

In *Cook vs. Avery*, 147 U. S. 375-384, it is said:

> "Whether a suit is one that arises under the constitution or laws of the United States is determined by the questions involved. If from them it appears that some title, right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the constitution of the United States, or a law of the United States, or sustained by the opposite construction, then the

case is one arising under the constitution or laws of the United States."

In *Filhiol vs. Maurice*, 185 U. S. 108-111, the plaintiff alleged in his bill that by the fifth amendment of the Constitution of the United States, and the third article of a Treaty of the United States of America and the Republic of France, the United States undertook and agreed to maintain the said Don Juan Filhiol and his heirs in their right and title to the land in controversy, and their full enjoyment of the same; but, in violation of the provisions of said treaty and without due process of law, and in violation of the fifth amendment of the constitution of the United States, defendants did, without condemnation and without compensation to plaintiffs, on or about the 2nd day of January, 1897, wrongfully and without right, oust the plaintiffs from the possession of the land, and on these facts, in a suit of ejectment, plaintiff claimed that the case was one arising under the constitution or a treaty of the United States. It is said in the opinion:

> "Did it appear from plaintiff's own statement that the case arose under the constitution, or a treaty of the United States? We do not think it did.
>
> * * * * * * *
>
> But no right, title, privilege or immunity was here asserted as derived from the constitution or the treaty, as against these private individuals, who were impleaded as defendants, either specifically or through averments that plaintiffs were ousted in violation of the treaty and of the fifth amendment, the provisions of which it was the duty of the federal government to observe. * * *
>
> It was not charged that they took possession by direction of the government, and plaintiffs set up no more than a wrongful ouster by merely private persons remediable in the ordinary course and in the proper tribunal."

See also *Filhiol vs. Torney*, 194 U. S. 356.

In *Defiance Water Company vs. Defiance*, 191 U. S. 184–190, quoting from *Telegraph Company vs. Railroad Company*, 178 U. S. 239–243 it is said (the italics are mine):

> "We have repeatedly held that, 'when a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the constitution or laws. *And it must appear on the record by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the constitution or some law or treaty of the United States, before the jurisdiction can be maintained on this ground.*' "

It was also said in that opinion, commencing at the bottom of page 193:

> "Moreover, the state courts are perfectly competent to decide Federal questions arising before them, and it is their duty to do so. * * * And, we repeat, the presumption is that in all cases the state courts will do what the constitution and laws of the United States requires * * *.
>
> If error supervenes, the remedy is found in Section 709 of the Revised Statutes."

In *Arbuckle vs. Blackburn*, 191 U. S. 405-413 the suit was brought to restrain the Dairy and Food Commissioner of the state of Ohio from enforcing an act of the Legislature of that state, and it was alleged in the bill that the act "construed as respondent claims it should be, is in conflict with the Fourteenth Amendment to the Constitution of the United States and void, in that it would deprive complainants of the aforesaid property,"

and would deny them "equal protection of the law;" and also, "and said statute, if construed as respondent herein claims it should be, is a regulation * * * of interstate commerce," *etc.* It is said in the opinion (the italics are mine):

> "The rule is firmly established that a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the constitution, upon the determination of which the result depends, and which appears on the record by a statement in legal and logical form, such as is reqired in good pleading.
>
> The averments of this bill did not bring the case within that rule, for they put forward no existing controversy as to the effect or construction of the constitution, on which the relief depended, and set up no right whieh might be defeated or sustained according to such construction."

It was further said in the opinion, (top of page 415,) that the suggested controversy was "purely hypothetical and based the supposed constitutional objection on the contingency that, on issues of fact, it might be judicially determined that Ariosa came within the statute, which complainant denied." And also that, "Reference to the constitution to strengthen objections to a particular construction, or the pursuit of a certain course of conduct, is not sufficient to invoke jurisdiction."

In the case at bar, the suit, in its substance, is a suit against the American National Bank to enforce the agreement of December 21, 1895, by a sale of the assets pledged as security, and in which the enforcement of the statutory liability of shareholders for the satisfaction of the same obligation is ancillary and depending upon the result of the sale.

Elminating from consideration the Federal origin of

the bank, and treating the question as if the suit was between "individual citizens of the same states" as the parties to this bill, there is not in the bill, so far as the averments against the bank are concerned, the least suggestion of a Federal question. The bill states nothing whatever more than an ordinary contract right or demand against the bank.

So far as the averments to charge the shareholders are concerned the bill contains the following (printed record, page 28):

"That by the reason of the voluntary liquidation of the said bank as hereinbefore set forth and the insolvency of said bank, and its inability to meet its obligations, this action is brought against the American National Bank and its stockholders jointly, under and through the authority granted by the laws of the United States relating to banking.

And your orator shows to this court that under and by virtue of the banking laws of the United States, each and every of said shareholders, holders of stock of such American National Bank, is held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of the said American National Bank, to the extent of the amount of his, her or its stock therein, at the par value thereof, in addition to the amount invested in said shares, and that each and every of the stockholders of the American National Bank, and each and every of the defendants named herein, are liable for the payment of the claim of your orator, and of the claims of all other creditors of the said American National Bank, to the amount of stock so held by said defendant."

It seems clear that the plaintiff was relying upon section 2 of the Act of June 30, 1876, already shown to have been repealed by the Act of August 13, 1888. Beyond this, these averments constitute nothing more than the assertion of a *right*, created by Federal law, to charge the shareholders individually, equally and ratably, for the contract obligation of the bank. But a bill

which merely shows that the right which it seeks to enforce is created by a statute of the United States does not invoke the jurisdiction, because it fails to show any dispute or controversy, "arising under" the statute.

The cases have firmly established the rule that the bill must allege distinctly, and in legal and logical form, such as is required in good pleading, *facts* which show that the case involves a real and substantial dispute or controversy as to a right, the solution of which dispute or controversy depends upon the construction or effect of the Federal law; so that, if the disputed construction or effect of the law be solved in one way, the right asserted by the bill will be upheld and enforced, but defeated if solved in accordance with the opposite construction. Nothing of this character is put forth in the bill in this case.

The state courts are fully competent to enforce rights created by Federal laws, and when a bill in the Circuit Court shows nothing more than such a right, which it seeks to enforce, the Federal jurisdiction is appealed to upon the assumption, or mere hypothesis, that the state court will not enforce the law. But the jurisdiction is not predicated upon this or any other hypothesis, but upon the certainty of a real and substantial dispute or controversy "arising under" the law, which must be set forth in the bill.

The Court of Appeals, in its opinion, cited its own case, *Guaranty Company vs. Hanway*, 44 C. C. A., 312, 104 Fed. 369, to sustain the jurisdiction on the ground that this suit is one arising under a law of the United States. But the analogy is not apparent. In that case, Hanway was the "shareholder's agent" provided for by Section 3 of the Act of June 30, 1876. A receiver had been appointed for a national bank by the Comptroller of

the Currency. The receiver had paid all claims, the expenses of the receivership, and money had been deposited to secure the redemption of the circulation. Pursuant to the provisions of that section, Hanway was then chosen by the shareholders as agent, and the remaining assets were transferred to him by the receiver and Comptroller. *All* of the powers and duties of such agent are created and defined by that section of the Act of Congress and the opinion of the Court of Appeals proceeded upon the theory that, like a receiver of a national bank, Hanway was an officer and agent of the United States, because the Act of Congress created his office, granted his rights and powers, and imposed his duties, and because every action by or against him involved the exercise of some of his rights or the proper discharge of some of his duties, and the consideration of the proper construction of the Act of Congress from which they were derived. Of course, the statute which, in a suit against a national bank, eliminates consideration of those laws, which create and define its powers and duties (its Federal origin) would not, in a suit against such an agent, be applicable. In that case it is said in the opinion:

> "The same reasons bring actions by or against a shareholder's agent under the same rule (as in suits by or against receivers of National banks). He is chosen under the same Act of Congress. He is selected for the same purpose. At a certain point in the administration of the trust, the act of Congress empowers the shareholders of a national bank to determine by ballot 'whether the receiver shall be continued, or whether an agent shall be elected for that purpose'. If they vote to continue the receiver, subsequent actions by or against him arise under the laws of the United States. If they vote to choose an agent for the same purpose under the same law, it is difficult to perceive why actions by

or against him do not arise under the laws of the United States. Those laws empower the agent, when chosen, to hold, control, and dispose of the property of the banking association which he receives for the benefit of the shareholders, to sue and to be sued, and to do all lawful acts necessary to finally settle and distribute the assets in his hands. They authorize him, with the consent and approval of the circuit or district court of the United States for the proper District, to sell, compromise, or compound the debts due to the association, and require him to report to, and obtain a final settlement of his accounts in, one of those courts. They specifically prescribe the purposes to which the proceeds of all the property which comes to his hands as the agent of the shareholders shall be devoted, and the order in which they shall be applied to those purposes."

There is, however, nothing of this kind in the case at bar. It is true, that Kimball was named in the agreement of December 21, 1895, as the agent of both parties to that agreement, and that, two months afterwards, February 25, 1896, at a special meeting of shareholders, a resolution then adopted to place the bank in liquidation (record, page 264), also provides, "that Thomas L. Kimball be and hereby is appointed the agent and trustee of the shareholders of said bank to effect such liquidation." But whatever his real relationship may have been, Kimball was not an agent by virtue of any Federal law, and he had no power and was under no duty created or imposed by any such law, and cannot be said to have been, in any sense, an officer or agent of the United States.

Weeks vs. Trust Company, 125 Fed. 379, 60 C.C.A. 236, also cited in the opinion of the Court of Appeals, merely followed *Guaranty Company vs. Hanway*, on the same facts.

III.

(*1*) *The agreement of December 21, 1895, between the two banks, was ultra vires the American National Bank.*

(*2*) *But if it be held not ultra vires in the absolute sense, the obligation thereby undertaken by the American National was not "duly contracted in the ordinary course of its business."*

(*3*) *In either event shareholders are not individually liable.*

The Circuit Court adopted the view that the transaction between the two banks was a lending of money by the Union National, and, consequently, a borrowing of money by the American National, and, therefore, within its powers and in the ordinary course of its business. (Record, p. 126).

The Court of Appeals interpreted the transaction (so far as it was deemed necessary to consider it in disposing of the case) as a contract by which: "The Union National assumed the payment of the liabilities of the American National to its depositors and on account of its bills payable, and in return was to receive its cash, cash items and such bills receivable as the former was willing to accept at par, and without recourse. The difference between the aggregate of the amounts so received and the gross amount of liabilities assumed, was to be represented by three non-negotiable promissory notes of the American National, the payment of which was to be secured by a pledge of all of its remaining assets to Thomas L. Kimball as trustee." (Record, p. 392).

The Court of Appeals then waived the considera-

tion of the question of power to enter into the agreement and held that the shareholders had *ratified* it and had thereby become individually liable. (Record, p. 398).

Each of these propositions, in the opinion of the Court of Appeals, is assigned as error.

It must be borne in mind that the appellant is not contending that the American National, the corporation, is not bound by the agreement of December 21, 1895, on principles of estoppel or ratification; but his contention is that the obligation which the corporation, through its officers, has undertaken to create by that agreement is not one for which the statute makes shareholders individually liable. It may be conceded that the corporation, although the agreement was absolutely *ultra vires*, at the time of its execution, has become liable, at least in some manner, by reason of subsequent events. It will not follow that shareholders are individually liable.

It is the appellant's contention that the inducement or consideration to the Union National was the acquisition of the business of the American National, and that the transaction was:

(1) *An absolute sale and transfer* of the business, the cash and cash items, the furniture and fixtures, and so much of the remaining assets of the American National as the Union National should take as cash. It hardly seems possible to have expressed this purpose more formally than it is expressed in the writing. By the terms of the writing, the American National agrees to "sell and assign and does hereby sell and assign", and the Union National "agrees to purchase and does purchase", *etc.*

(2) *A conditional sale and transfer* of all of the remainder of the assets of the American National to the

Union National as security, and to enable the Union National to liquidate and convert them into money under its agreement to do so. Here, also, the writing is as formal and certain as it could well have been made. The words are: "And as further security", the American National "agrees to sell and assign, and does hereby sell and assign" to the Union National. This shows a clear purpose to vest the title in the Union National to enable it to liquidate the assets under its agreement, and to reimburse itself for the sum it should pay by assuming the debts of the American National due to depositors and for bills payable.

(3) *A guaranty by the American National against loss* to the Union National, that is, that the Union National would realize by such liquidation, a sum equal, at least, to the obligations which it had assumed. Again, the writing is formal and explicit. By its terms, the American National "further agrees to guarantee and does hereby guarantee" the Union National against all loss in consequence of having assumed such obligation.

(4) *That there was no debt to the Union National* and that the three so-called promissory notes for $67,000 each, were not evidence of any debt, but merely the *form* in which the American National expressed, in part, its guaranty against loss, for the convenience of the Union National. The writing makes it clear beyond controversy that these notes were not designed to evidence any *debt*. The amount guaranteed by the American National could not be ascertained and fixed in the principal writing, at the time of its execution, and immediately following the guaranty, the writing provides: "And to this end", that is, to the end that the Union National should be guaranteed against loss, the Ameri-

can National agreed to give the three non-negotiable notes, *etc.*

(5) That the consideration to the American National was, not money borrowed or received by it, but the promise of the Union National to pay its debts, liquidate the whole of its assets without charge therefor, and to account for any surplus.

The conclusion of the Circuit Court (which I presume will be pressed in argument here) that the transaction was a borrowing of money by the American National, and the construction put upon the agreement by the Court of Appeals, ignore the essential features of the transaction. It was one transaction, and the agreement and notes must be considered together in order to determine the real character of it; and when so considered, it seems impossible to regard the notes as anything more than a part of the contract of guaranty. It is true, the notes do not, when thus considered with the agreement, express any higher obligation than the agreement of guaranty, standing alone, would express; but the agreement defines and limits the legal obligation of the notes, which were made non-negotiable in order that they might not, by transfer, be made to import a higher obligation than that expressed in the agreement. It was convenient, if not necessary, to have it in the form the parties put it. The Union National was acquiring the business of the American National. It was not paying, but was assuming the payment of depositors balances. Its motive was to retain these depositors in its own business to the extent that the actual payment and closing of accounts should not be demanded by them. Its method would be, and was in fact, to transfer the accounts from the books of the American National to its own books. These accounts, when transferred, would

become "liabilities" on its books, for which it must have assets in equal amount. The notes secured by the assets of the American National would answer this purpose, pending the liquidation of the assets.

MR. BAIRD, commencing at the bottom of page 151 of the record, testifies as follows:

"Q. But the Union National Bank had not, at that time, paid the deposits, it had only agreed to pay them?

A. No sir; it had only agreed to pay them at the time those notes were executed.

Q. So there was no indebtedness from the American National Bank to the Union National Bank?

A. None, only what was implied in, or resulted from, that contract, so far as I know.

Q. And is it not true, that, at that time, the Union National Bank expected to liquidate the assets of the American National Bank rapidly enough to meet the demands of the depositors of the American National Bank?

A. It is true, that all parties connected with the contract expected, at that time, to be able to realize on the assets of the American National Bank within the time necessary to meet these notes.

* * * * *

Q. And these notes were not given because of the existence of an obligation or debt at that time for the amount of them, or because you expected an obligation or debt of that amount?

A. They were not given at the time for any debt which had previously existed from the American National Bank to the Union Bank; but they were given as a means of meeting the obligation which confronted the American National Bank, which it was not able to meet, at this time, without making some terms.

Q. Well, the Union National Bank transferred the depositors accounts of the American National Bank to its own books, did it not?

A. I do not know what the process was there.

Q. You were a depositor of the American National Bank?

A. Yes sir.

Q. And you say you drew your check and got your money?

A. I did; I transferred my account to the Union National, as I now remember it.

Q. That is the way in which the American (Union) National paid you?

A. Yes, the Union National paid me by giving me credit on my account with the Union National.

Q. Then you drew your check on the American National?

A. Yes, for whatever balance I had there at that time.

Q. For the mere purpose of transferring your account to the Union National?

A. Yes sir.

Q. And the Union National Bank procured the other depositors to do the same, in so far as they did not demand the money, did it not?

A. So far as I know.

Q. And that would necessitate the Union National Bank having some assets to offset the amount of the deposit of the American National Bank that it assumed in your case, would it not?

A. I presume it would, as a matter of banking business, in order to meet the demand of the Comptroller of the Currency.

Q. So far as the American National Bank's cash on hand was concerned, and its bills receivable which the Union National accepted as cash, the Union National carried that right into its own assets?

A. That was my understanding, yes sir.

Q. And the amount of the American National Bank's indebtedness to depositors which was assumed by the Union National Bank, and for which the Union National did not get money, or other assets of the American National Bank, would be a liability on the part of the Union National Bank for which they would have to have some form of assets?

A. Yes sir.

Q. Now, is it not true, that these three notes were executed for the purpose of giving them assets to offset that liability in view of the fact that the other assets of the American National Bank, which the Union

National Bank did not take absolutely, passed, nominally, at least, into the hands of Thomas L. Kimball, trustee?

A. It is true, that those notes were given to the Union National Bank for the purpose of off-setting the liability which the Union National Bank assumed in payment of the deposits of the American National, to the extent of those notes."

MR. WYMAN testified, commencing at the bottom of page 176:

"Q. The Union National had then taken possession of the office rooms occupied by the American National?

A. Yes sir.

Q. And the assets of the American National which were turned over to the Union National were kept in that office?

A. Yes sir.

Q. And kept in the same vault with the Union National Bank's business?

A. Yes sir.

Q. Now, when the transfer was made, December 21, 1895, the Union National took all of the cash items held by the American National Bank, did it not, in its own possession?

A. Yes sir.

Q. And all of the bills receiveable of the American National Bank which the Union National Bank decided to accept in lieu of cash, or as the equivalent of cash?

A. Yes sir.

Q. And the Union National, at the same time, carried on its books, all the deposit accounts of the American National, did it not?

A. They were transferred from the American National to the Union National, yes sir.

Q. So they would show a liability on the part of the Union National Bank to the depositors of the American National Bank?

A. Yes sir.

Q. So you deducted the assets which the Union

National accepted as cash from this liability assumed by the Union National, in order to ascertain the amount for which these notes were given, these three notes marked Exhibits 2, 3 and 4?

A. Yes sir.

Q. Is it not true, Mr. Wyman, that the Union National desired those three notes merely for the purpose of showing assets to offset the liability which it had assumed in excess of the cash and bills receivable which it had accepted as cash from the American National Bank?

A. I could not answer that question, as I was not in touch with the officers of the Union National Bank on matters of this contract. I did not know what their intentions were.

Q. It is true, is it not, Mr. Wyman, that at the time of the execution of these notes, December 23, 1895, the American National Bank did not owe to the Union National Bank $201,000, or any portion of that sum?

A. Well, we had turned them over all our assets.

Q. Still the American National Bank did not owe that sum, or any portion of it, did it?

A. I do not know how to answer that question.

Q. Well, if you have any doubt about it, will you state anything out of which that indebtedness arose, or any part of it?

A. The indebtedness arose through the assumption by the Union National Bank of the deposits and bills payable, and other indebtedness of the American National Bank.

Q. Now, on December 23, 1897 (1895) the Union National Bank had not paid these deposits, had it?

A. No; they had not paid them.

Q. They had merely agreed to assume them and had given notice of its assumption?

A. Yes sir.

Q. So there was no indebtedness whatever between, or from the American National Bank to the Union National Bank, unless it arose out of this contract of December 21, 1895?

A. That is the only way it arose."

MR. RAINEY testified, commencing at the bottom of page 192:

Q. "When the Union National Bank moved into the offices of the American National Bank and took possession, it immediately transferred from the books of the American National, all deposit accounts showing balance due the depositor, to the books of the Union National Bank?

A. Yes sir.

Q. So that, so far as the bookkeeping was concerned, the former depositors of the American National Bank then became depositors of the Union National Bank?

A. Yes sir.

Q. And had the same credits standing upon the books of the Union Natinoal Bank?

A. Yes sir.

Q. Any depositors of the American National Bank who came in and wanted his money got it from the Union National Bank?

A. Yes sir.

Q. But if he was willing to, he simply continued his business with the Union National Bank?

A. He did, yes sir.

Q. Checking against the balance transferred from the books of the American National and making deposits in the Union National Bank?

A. Yes sir."

Construing the notes and the agreement together, it is believed to be clear beyond controversy they constitute a guaranty by the American National that the Union National would realize out of the assets of the American National, by its liquidation of them, $67,000 in one year, a like sum in two years, and a like sum in three years, and that they can not be otherwise interpreted.

If the American National had been borrowing money to tide it over its embarrassment, due to the apprehension that the payment of some of its larger depositors

accounts would be demanded, it would not have borrowed a sum equal to the *whole* of its liabilities; it would not have *sold*, absolutely, its *business*, its *furniture and fixtures;* it would not have transferred the whole of its *cash* and *cash items*; it would not have surrendered its *offices* and transferred the *whole of the remainder of its assets* to the Union National for liquidation; it would not have made any agreement procuring another corporation to assume payment of its liabilities, and to liquidate such assets.

The Circuit Court interpreted the opinion in *Schofield vs. State National Bank*, 38 C. C. A. (8th Circuit) 179; 97 Fed. 282, as authority for the conclusion that the transaction between the banks was a lending of money by the Union National and the borrowing of money by the American National; and, relying upon *Auten vs. United Stated National Bank*, 174 U. S. 125, and *Aldrich vs. Chemical National Bank*, 176 U.S. 618, as authoritatively settling the proposition that borrowing money by a national bank is not out of the ordinary course of the banking business, it reached the conclusion that the transaction in controversy was not *ultra vires* the American National, and was in the usual course of business. But if it be granted that the Circuit Court correctly interpreted the Schofield case, the conclusion is not sound. If the money be borrowed in the usual course, and in furtherance, of the *authorized* business of the borrowing bank, the transaction will be *intra vires;* so, if it be not so borrowed, but the lending bank believes it to be, and is justified by the facts within its knowledge in so believing, *ultra vires* is no defense in a suit by the lending bank.

United States National Bank vs. First National Bank, 24 C. C. A. (8th Circuit) 597; 49 U. S. App. 67.

These principles controled the opinion of this court in the case of *Auten vs. United States Bank* (which is the same case as *United States National Bank vs. First National Bank*), and in *Aldrich vs. Chemical National Bank.*

But if money be borrowed for an *unauthorized* use and the lending bank is aware of all of the facts, and a participant in the wrongful purpose, even though the transaction be formally authorized by the Board of Directors of each bank, it will be *ultra vires* and not enforceable, and the statutory liability of the shareholders cannot be enforced to satisfy the loan. This is the principle which, if the transaction was a borrowing of money by the American National, is applicable to the case at bar. The UnionNational Bank knew all of the facts and was a participant in the illegal purpose of the transaction. The *whole* of the transaction must be considered, and if I am correct in my contention, that a national bank, when confronted with the fact that it is unable to continue in business, has no power to renounce its own functions and powers and transfer the whole of its assets to another bank for liquidation, then it is equally true that it has no power to borrow money in furtherance of such a purpose, and the promise to pay, if the lending bank knew of and was a party to the unauthorized purpose, would be void and no obligation could arise out of the transaction that could be enforced against shareholders.

But I am not willing to concede that the transaction in controversy was a lending of money by the Union National and a borrowing by the American National, or that the opinion in *Schofield vs. State National Bank* is authority for that contention. That question was not before the court in that case for decision. In that case,

the State Bank transferred its furniture, and cash items to the Union Bank, amounting to $67,803.56, absolutely, and transferred bills receivable amounting to $564,000, as security, making an aggregate of $631,803.56, but retaining assets amounting to $245,446.80. The Union Bank agreed to assume and pay the debts of the State Bank, for borrowed money and deposits, which amounted to $560,641.64, and to account for any surplus it might realize out of the security. Both banks afterwards became insolvent, and the Receiver of the Union Bank came into possession of the bills receivable, transferred to it by the State Bank amounting to $279,552.95. He tendered these back, and sued to recover the difference between the amount of the debts of the State Bank assumed by the Union Bank, and the amount realized by the latter from the securities which had been converted. There was no promise by the State Bank to pay any such difference, and the shareholders of the State Bank were expressly released from individual liability, by the agreement. The receiver sought to rest an implied promise by the State Bank to pay such difference on the ground that the contract of the Union National Bank was *ultra vires*. There was no question raised as to the validity of any promise of the State Bank or the liability of its shareholders, because there was no such promise or liability. The Court of Appeals, said in the opinion, that there were many fatal objections to the Receiver's contention, and among them, that there was nothing in the contract of the Union Bank that was beyond its powers, and, while it is true that in support of this conclusion, the opinion does (*arguendo*) treat the transaction, as far as the Union Bank is concerned, as a lending of money, it was not said that the transaction was on the part of the State Bank a borrow-

ing of money. To the contrary, it was expressly held that the State Bank was not bound by either express or implied promise to repay, and therefore, it could not have been a borrower.

There are obvious distinctions between that case and the case at bar. There was not in that case, any abdication by the State National Bank of its own powers and duties, and guaranty of liquidation of the whole of its assets by others, thereby prolonging, by creating an entirely new obligation, the liability of shareholders of the State Bank. The State Bank did not transfer the whole of its assets to the Union Bank, under an agreement to liquidate the whole, but transferred without endorsements bills receivable of the face value of $564,000, as security against liabilities assumed, amounting to $492,838.08, the Union Bank agreeing to account for any surplus it should receive out of the securities, and the State Bank retaining assets of the face value of $245,-486.90. The transaction was more in the nature of an absolute sale of its business and a part of its assets, and a pledge of another part, but not of the whole, by the State Bank. The Union Bank, in that case, did not occupy the position of the American National in this, much less, the position of shareholders; but so far as the case is parallel at all, the Union Bank occupied the position of the Union National in this case, and its receiver, asserting what he claimed were the rights of the Union Bank, was pleading *ultra vires* in order to defeat its own contract.

In *United States National Bank vs. First National Bank*, 24 C. C. A. 507; 49 U. S. App. 67, the United States National Bank (termed in the opinion the "New York Bank"), had, at the request of the First National Bank, (termed in the opinion the "Little Rock Bank")

re-discounted paper at various times to a large amount, believed, and represented, to belong to the Little Rock Bank, whose endorsement was written on the paper. It turned out, however, that a part of the paper did not belong to the Little Rock Bank, but was fraudulently endorsed by its President. The suit was to charge the bank on the endorsement. It had previously been held by this court (*Western National Bank vs. Armstrong*, 152 U. S. 346), or at least the opinion was so understood by the Little Rock Bank, that the borrowing of money by a bank, though within its corporate powers, was so far out of the course of ordinary and legitimate banking business that it put the lender upon inquiry as to the authority of the officer or agent of the borrowing bank. The Little Rock Bank, therefore, claimed the transaction was, on its part, a borrowing, and on the part of the New York Bank, a lending of money, and that the president of the Little Rock Bank had not been authorized by its Board of Directors. The trial court had charged the jury that the transaction was a borrowing of money, and that the president of the Little Rock Bank had no implied power to endorse the paper, so that the Court of Appeals was discussing the question, whether the transaction was or was not a lending on one side, and borrowing on the other. In the opinion it is said (49 U. S. App. 71):

> "We are of the opinion that that part of the aforesaid charge which declared that a re-discount by a bank of its bills receivable, if it endorsed the same, is a borrowing of money, and that part which declared, in substance, that a president of a national bank has no implied power to endorse its commercial paper, were erroneous. There is an obvious difference between a transaction where a bank goes in the market without giving its own notes, bills or other obligatons for the money, and a transaction

where it disposes of the notes and bills of third parties which it has previously discounted. In the former case, it becomes primarily bound; it is the principal debtor; while in the latter, even if it endorses the paper, it only incurs a contingent liability which may never ripen into an absolute obligation to pay. The latter transaction has more, if not all, of the characteristics of a sale, and it is generally regarded as a sale whereby assets of a certain kind are converted into cash. It may properly be said that a bank or individual borrows money when they execute their own notes and bills and receive the money thereon, from a third party, even though the interest to accrue is deducted in advance in the form of a discount; but we can see no propriety in characterizing a transaction as a borrowing of money where a person or corporation sells commercial paper made by third parties, which he or it happens to own."

Considering the expressions contained in the opinion in these two cases by the same court, they prove the wisdom of the rule, "that the authority of general expressions and broad statements in the opinions of courts is always limited to the single question which they were considering and deciding when they were used," a proposition which does not require citations.

It is true, that in the case at bar, the American National executed and delivered what, in form, were promissory notes, obligating itself to pay money, but it has already been shown that these so-called promissory notes were merely parts of an agreement to guarantee against loss, and that there was not, in fact, any existing indebtedness, or anything received by the American National but the promise of the Union National, or any primary obligation on the part of the American National agreed upon between the parties.

The power of National Banks to lend and borrow money is defined and limited by sub-division 7 of Section 5136, R. S., as follows:

> "SEVENTH: To exercise by its Board of Directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidence of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title."

It can not be seriously claimed, I think, that the acts of the American National were done in, or incidental to, carrying on the business of banking, in the sense of this provision; and it seems impossible to find anything whatever in the transaction justifying the conclusion that the acts of that bank constituted a borrowing of money within its powers to carry on the business of banking. There was no debt owing from the American National to the Union National at the time of the transaction. The American National did not expect to pay, nor did the Union National expect to receive, any money, otherwise than through the conversion of the assets into money. The obligation assumed by the American National was not intended to be a primary obligation. Each bank thought the assets more than sufficient to secure a sum equal to the liabilities assumed by the Union National. As the matter stood at the date of the notes (December 23, 1895), the Union National had all of the assets of the American National, and in addition its three notes for $67,000 each, and the "cashier's check" for $39,929.51, had not paid a dollar, and the American National had nothing.

The bald and indisputable fact is that the American National, through its board of directors and officers, undertook to dispose of all of its assets, and immediately

cease all business and to renounce all control and management of its affairs; to procure the Union National to liquidate its assets, exercising unlimited discretion; and to guarantee that the Union National would, as a result of the liquidation of these assets, realize a sum at least equal to the amount of the debts assumed by it. It was an abandonment of all its powers and functions by the American National, and an attempt to create a new obligation in furtherance of such abandonment, which, if its shareholders are to be held liable individually, would extend their liability for years. These important features of the agreement were completely elminated from consideration by the Court of Appeals.

Can a national bank, by guaranteeing the results of such a transaction, create an obligation for which shareholders are liable under the statute?

In *Richmond vs. Irons*, 121 U. S. 27, the President of the bank, after the bank had gone into liquidation, and, as he supposed, in the due course of liquidation, settled with some creditors by transferring to them paper held by the bank, but he endorsed on the paper, in the name of the bank, a guaranty of payment or the equivalent. The question was, whether the obligation thus created in the name of the bank and for which the bank received an equivalent in settlement, was one which could be included in the sum for which shareholders were individually liable, and it was held that it was not such an obligation. At page 59 it is said:

> "Those creditors who made settlement after the bank was put into liquidation and received from the president for that settlement, paper of the bank, or, as in some cases, the individual notes of Holmes himself, endorsed or guaranteed in the name of the bank, are not to be considered as creditors of the bank entitled to subject the shareholdes to individual

liability. The individual liability of the stockholders, as imposed and expressed in the statute, is, indeed, for all the contracts, debts and engagements of such association, *but that must be restricted in its meaning to such contracts, debts, and engagements as have been duly contracted in the ordinary course of its business.* That business ceased when the bank went into liquidation; after that, there was no authority on the part of the officers of the bank to transact any business in the name of the bank, so as to bind its shareholders, except that which is implied in the duty of liquidation, unless such authority had been expressly conferred by the shareholders. No such express authority appears in this case, and the power of the president or other officer of the bank to bind it by transactions after it was put into liquidation, is that which results by implication to wind up and close its affiairs. That duty consists of the collection and reduction to money of the assets of the bank, and the payment of creditors, equally and ratably, so far as the assets prove sufficient. Payments, of course, may be made in the bills receivable and other assets of the bank, in *specie*, and the title to such paper may be transferred by the president or cashier by an endorsement suitable to the purpose, in the name of the bank, but such endorsement and use of the name of the bank is in liquidation, and merely for the purpose of transferring title. It can have no other effect as against the shareholders by creating a new obligation. It does not constitute a liability, contract, or engagement of the bank for which they can be held to be individually responsible. Every creditor of the bank, receiving its assets under such circumstances, knows the effect of liquidation, and is chargeable with knowledge of its consequences; he takes the assets received at his own peril; he is dealing with the officers of the bank only for the purpose of winding up its affairs. If he accepts something in lieu of an existing obligation, looking to future payment, it must be from other parties. *It is not within the power of the officers of the Bank, without express authority, by such means to prolong indefinitely an obligation on the part of the shareholders which is imposed by the statute only as a means of securing payment of debts by an insolvent bank, when it is no*

longer to continue business, and for the purpose of effectually winding up its affairs. This is the very meaning of the word liquidation."

In the case at bar, the American National was unable to proceed in business. Its assets had become a trust fund for creditors and shareholders. It resolved to cease business, not by voluntary liquidation through its own authorized officers, and by the execution of its own powers and performance of its duties, nor by applying to the Comptroller to take charge of and liquidate its affairs, either of which would have been within its powers, but by transferring the whole of its assets to the Union National and by devolving upon that association the power and duty to administer the trust which the law devolved upon its own officers. Simultaneously with this renunciation of its powers and duties, it undertook to create an entirely new obligation, not in the ordinary course of its banking business at all, but in the surrender and abandonment of it, by guaranteeing to the Union National the result of the liquidation of the assets by that corporation. It is true, the agreement provided for participation of Kimball in the liquidation of its assets; that is, the two corporations, through their respective boards of directors, undertook to clothe him with some power resembling that of an agent for both, as well as the shareholders of the American National. It can not be said however, that the agreement made Kimball a trustee of the assets in any other sense than every agent is a trustee, for he took no title to these assets in trust or otherwise. By the terms of the agreement Kimball was to "receive, hold and use the *proceeds* of the assets", as trustee of the parties, "for the mutual protection of the rights of each", under the agreement. The assets were "sold and assigned" to the

Union National Bank, but as "further security" to the guaranty of the American National against loss by reason of the assumption of liabilities, and while witnesses for plaintiff, testifying to mere conclusions, said that the assets were turned over to Kimball as trustee, the undisputed fact was that the Union National Bank immediately moved into the rooms previously occupied by the American National and took possession pursuant to the agreement.

The provision of the agreement by which the Union National agreed, unqualifiedly, to liquidate the assets thus taken, without charge or expense to the American National, and the provision that such liquidation should be conducted under the direction of Kimball (or such other person as should be agreed upon) on behalf of the stockholders of the American National; and the transfer by the American National of all of the assets to the Unnion National as security subject to the right of Kimball or his successor to convert them into money for the purposes of the agreement, seem to be hardly consistent. But the American National had no power to name a person to represent its shareholders or to invest him with any power to bind them, nor had it power to bind *itself* by agreement with the Union National that Kimball or any other person should represent the shareholders. They had already chosen their own representatives for the management of all of the affairs of the association when they selected a board of directors, and had the right to choose such representatives at each annual meeting, and it was the legal duty of such board, so chosen, to manage the affairs of the bank, including the liquidation of its assets.

The true interpretation of these provisions is, I think, that, while the Union National Bank was re-

quired to liquidate the assets thus taken, it was also required to employ Kimball to take charge of and direct the liquidation. But whether we give the greater force to one or the other of these provisions, the controlling fact remains, that by its agreement, the American National divested itself and its board of directors of all control over the whole of its assets, placed them in the possession of the Union National Bank and invested that association and Kimball with unlimited discretion, renouncing its own powers, and undertook to obligate itself by a guaranty against the disasterous result already shown. It is not important to whom the discretion was delegated, as, under the agreement, the delegation was so complete and absolute that the directors of the American National could not even remove and appoint a successor to Kimball without the consent of the Union National.

Schrader vs. Manufacturer's Bank, 133 U. S. 67, is a case which grew out of the same facts as *Richmond vs. Irons*, *supra*. In that case a creditor had obtained judgment against the liquidating national bank on his claim. The claim was founded upon an agreement made in its name by the president of the liquidating bank, *continuing* a guaranty by the bank, this agreement being made after the bank had gone into liquidation. A judgment had been obtained against the bank on the continued guaranty, and suit was brought to charge the shareholders for the amount of the judgment. It was held that the judgment against the bank was open to examination as to the individual liability of the shareholders therefor, and that the shareholders were not liable, and the language above quoted from *Richmond vs. Irons*, is reiterated in the opinion.

In *Ward vs. Joslin*, 186 U. S, 142, The Western In-

vestment, Loan & Trust Company, a Kansas corporation, guaranteed the payment of promissory notes for a valuable consideration. The officers of the company were authorized by the directors to guarantee payment of promissory notes negotiated by the company; but the notes guaranteed were not so negotiated. Judgment was obtained against the corporation in a state court of Kansas, on the guaranty, and the corporation paid a part of that judgment. Suit was brought to recovor the unpaid portion of the judgment in the Circuit Court of the United States for the District of New Hampshire, against a shareholder of the corporation, by enforcing such shareholder's individual liability created by the constitution and laws of Kansas. The Circuit Court ruled (100 Fed. 676) that the obligations of the corporation for which shareholders were made liable by the constitution of Kansas (which described the obligation by the use of the word "dues") were such only, as resulted from the legitimate and contemplated business of the corporation; that is, contemplated by the members or shareholders as shown by the articles of association, and that the guaranty in that case was not such an obligation and was not within the authority given by the directors to the president and secretary; also, that the judgment against the corporation did not estop the shareholder, and that he was *not* liable. The Court of Appeals affirmed (105 Fed. 220). This court also affirmed. The opinion contains the following (p. 151):

> "Can an obligation which a corporation had no right to incur be a contractual obligation, and the basis of 'dues', as that word is used in the state constitution? We do not think so. It appears to us that it was not intended by that instrument to impose individual liability on stockholders in respect to risks which they had not undertaken. One of the

> grounds on which the doctrine of *ultra vires* rests, is that the interest of the shareholders ought not to be subject to such risks. Rights of stockholders must be considered, as well as those of creditors, and they should not be held directly liable, unless such liability was within their contract in legal contemplation."

The obligation sought to be enforced in the case at bar is no more within the risks assumed by shareholders or, in legal contemplation, within their contract as shareholders, than the obligation in the case cited was, and it will certainly be a surprise to shareholders in the national banks of the country when they learn that these associations have the power by such agreements to subject them to such risks.

Shareholders become members of a national bank corporation with the law and the articles of association before them. They do not assume or contemplate risks or liabilities which are not imposed by these; and it is settled by the foregoing cases, that when the obligation is *ultra vires*, or when, though not a prohibited transaction, it was not, in the language of *Richmond vs. Irons*, "duly contracted in the ordinary course of business" of the corporation, the shareholders of a national bank can not be held individually liable. The statutes governing these institutions do not contemplate the making of any such obligations by them, and, therefore, Congress can not be said to have intended to impose a liability on the shareholders; nor can the shareholders be said to have intended to assume the risk of such liability.

> "It is well settled that the United States statutes relative to national banks, constitute the measure of authority of such corporations, and that they can not rightfully exercise any powers except those

expressly granted, or which are incidental to carrying on the business for which they are established."

California Bank vs. Kennedy, 167 U. S. 362-366.
Concord Bank vs. Hawkins, 174 U. S. 366.

It was held, therefore, in the case of the California bank, just cited, that a national bank was not liable as a shareholder in another corporation, because of shares held by it, although it had taken dividends on the shares; and it was said that a *prohibition* to acquire the shares was *implied from the failure to grant the power*. It was also said in that case (p. 369):

"The power to purchase or deal in stock of another corporation, as we have said, is not expressly conferred upon national banks, nor is it an act which may be exercised as incidental to the powers expressly conferred. A dealing in stock is, consequently, an *ultra vires* act. Being such, it is without efficacy."

The same principle, it is obvious, applies to every act attempted by a national bank, which is neither expressly conferred upon it by the statute, nor one which may be exercised as incidental to the powers expressly conferred.

Concord First National Bank vs. Hawkins, 174 U. S. 364, and cases cited.

By Section 3156 R. S., it is provided that upon making and filing articles of association, and an organization certificate, the association shall become a body corporate with certain powers (specifying them); but it is not to transact any business, except such as is incidental and necessarily preliminary to its organization, until the Comptroller of the Currency has authorized it "to commence the business of banking." This provision has been construed by this court.

In *McCormick vs. Market Bank*, 165 U. S. 538, the bank was duly organized, its articles of association providing for $100,000 capital, and it had procured a seal, but had *not* received the certificate of the Comptroller permitting it to "commence the business of banking." It entered into a contract, duly executed under seal, for the lease of a building to be used for its office, and "for no other purpose." The lessor expended money in putting the building into condition as required by the terms of the agreement, and he believed that the bank was duly authorized to make the contract. The bank went into possession. The Comptroller refused a certificate, because the capital was not, in fact, paid as required by law. The lessor sued for rent; but the contract was held to be, on the part of the bank, *ultra vires* and void. It was said in the opinion (p. 549):

> "The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers, is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three definite grounds: the obligation of any one contracting with the corporation to take legal notice af the legal limits of its powers; the interest of stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transend the powers conferred upon it by law."

The rule that the United States statutes create the measure and prescribe the limit of the powers of the national banks, has never been departed from by this court, and in the application of that rule, no act has ever been recognized as incidental, unless it was *necessary* to the exercise of powers expressly granted. The rule of this court is, in respect to these statutes, that the failure to grant a power prohibits, by implication, its exercise.

The incidental powers which may be exercised by such association are expressly defined by sub-division 7 of Section 5136 R. S. to be such as *are necessary to carry on the business of banking.*

By Sections 5145, 5146, 5147, 5148, R. S., Congress provided:

(1) That the "affairs" of each national bank *shall* be managed by a *Board of Directors.*

(2) That these Directors shall be *elected by the shareholders.*

(3) That they shall hold office for *one year.*

(4) That three fourths of the Directors shall reside in the state during their term.

(5) Each Director must own at least ten shares of stock.

(6) Each must take an oath to diligently and honestly administer the affairs of the association, and in accordance with the acts of Congress.

(7) That a vacancy in the Board shall be filled by appointment made by the remaining Directors.

Every shareholder of the American National, when he became a member of the association, was assured by these provisions that the "affairs" of the association could only be managed by its Directors, thus chosen and thus qualified, and every person contracting with the bank was bound to know that these provisions were limitations upon the powers of the bank.

By Section 5220 R. S. national banking associations are empowered to "go into liquidation and be closed" upon the vote of their shareholders owning two-thirds of the capital stock.

To "go into liquidation and be closed" means nothing less than the winding up of the "affairs" or business of the association, and this is the method provided

for doing this *voluntarily*. The "liquidation" and "closing" of the association by its own voluntary action, is as much a part of the "affairs" of the association, to be managed by its own Directors, as is the current business of a going concern. Such liquidation requires the continuous exercise of judgment and discretion in the interest of shareholders as well as creditors. When the Congress, in broad and mandatory language required the "affairs" of an association to be managed by a Board of Directors it did not execpt, or intend to except, the important and delicate business of liquidating and closing its affairs, requiring even greater care than a going business. The power given to the association is a power to be exercised by its own Board of Directors. The law is an assurance to shareholders and notice to the public, thal *all* of the affairs of the association shall be managed (not in every detail, but in the sense of control, supervision and direction) by a Board of Directors selected by the shareholders, chosen for a short period of time, subject to removal, having pecuniary interest in the event of their management, and each acting under oath. Powers and duties requiring the exercise of such discretion and judgment, when devolved by law upon such a body, can not be delegated, much less can the result of such delegation be guaranteed by the corporation.

But the association did, in the case at bar, acting by its Board of Directors, delegate, or undertake to delegate, all of its powers. It reserved none whatever. It bound itself to surrender everything—all of its assets and all power to manage or control them. It gave to the Union National Bank and Kimball (who acted not as president, but as an alleged trustee or agent for conflicting interests) the greatest conceivable discretion, unlimited as to time and scope, to liquidate and close,

and thereby to "manage," the "affairs" of the association. It remitted creditors and shareholders to the discretion and judgment, integrity and responsibility, of the Union National and Kimball for the protection of their rights, and having made this obviously illegal arrangement, it undertook to guarantee that the exercise of these delegated powers and discretion, by them, should produce no loss to the Union National on account of the liabilities which, in order to get the business of the American National, it had assumed the payment of. It undertook to enlarge and prolong the liability of shareholders indefinitely.

No prohibitory provision of the law is more emphatic than that which requires the affairs of a national bank to be managed by its Board of Directors, and it is difficult to conceive a case coming more clearly within that prohibition than is found in this record. The guaranty was not only a guaranty of the value of the assets, but a guaranty against errors of judgment, lack of dilligence and foresight, even negligence and maladministration (which may often exist when it can not be proven) of the Union National and Kimball.

Was not the agreement of December 21, 1895, clearly and indisputably *ultra vires?*

Was it not clearly and indisputably one which, in the language of the opinion in *Richmond vs. Irons*, was not "duly contracted in the ordinary course of its business"?

Was it not one which the Union National accepted at its peril?

It seems that each of these questions must be answered in the affirmative, and that it has been conclusively shown that the demand is not one for which shareholders are individually liable, unless this conclu-

sion is affected by subsequent ratification by the shareholders. The case, I think, falls clearly within the principle decided many times by this court, holding agreements made by corporations to be *ultra vires*.

Central Transportation Co. vs. Pullman Car Co., 139 U. S. 24, and cases there cited.

In the case last cited, it was said (p. 59):

> "A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore, beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract can not be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

That case was decided after examination of many cases cited in the opinion, and the language above quoted has been repeatedly referred to in later opinions, and has become the settled rule, in this court.

It is said in the opinion of the Court of Appeals (page 399):

> "When the contract was entered into, the American National was confronted by an emergency. The withdrawal from the bank of a large amount of deposits was anticipated, and it had not the money or available cash resources to meet it and thereafter continue business. At the time, as subsequent experience demonstrated, the bank was, in fact, hopelessly insolvent. But in the light of the conditions which were known, it was within the power of the officers and directors of that bank to make the contract of December 21, 1895, with the approval of the shareholders owning a larger proportion of the capital stock than was necessary under the law in the case of a voluntary liquidation."

The proposition that a national bank, when it has become insolvent, or is no longer able to proceed in business, has power, with the consent of shareholders owning more than two-thirds of its shares, to surrender its assets to another bank for liquidation, with a guaranty against loss, as in this case, is, I respectfully think, in conflict with the principle established by the decisions of this court already cited. If a national bank can so renounce its powers and duties in favor of another bank, it can do the same thing in favor of any other corporation or individual it may select, in or out of the state in which the bank is located. This would certainly be a very dangerous power and one which should not exist. In creating these institutions, Congress endeavored to provide safeguards for the public and for shareholders by limiting their powers, by providing for the management of their affairs by a Board of Directors, each member sworn to discharge his duties according to law, and by providing for voluntary liquidation by an association through its own officers, and for compulsory liquidation by the Comptroller of the Currency through the appointment of a receiver in cases of insolvency. If an insolvent national bank may enter into such an agreement as the one made in this case, it is difficult to see what it may not do in the absence of *express* prohibition. But the rule is firmly settled by the decisions of this court that a power not granted is prohibited by implication.

First National Bank vs. National Exchange Bank, 92 U. S. 122.

California Bank vs. Kennedy, 167, U. S. 362.

Concord National Bank vs. Hawkins. 174 U. S. 364.

In *Concord National Bank vs. Hawkins*, just cited,

the question was as to the power of a national bank to acquire the shares of another national bank by purchase or as an investment, and its liability to an assessment upon such shares as the owner of them—individually liable as a shareholder. The principal reason given for denying the power and the liability, was that the law required that at least three-fourths of the Directors of a national bank must reside in the state where tho bank is located. It was said in the opinion in that case (p. 368):

> "One of the evident purposes of this enactment is to confine the management of each bank to persons who live in the neighborhood, and who may, for that reason, be supposed to know the trustworthiness of those who are to be appointed officers of the bank, and the character and financial ability of those who may seek to borrow its money. But if the funds of a bank in New Hampshire, instead of being retained in the custody and management of its Directors are invested in shares of a bank in Indiana, the policy of this wholesome provision of the statute would be frustrated. The property of the local stockholders, so far as thus invested, would not be managed by Directors of their own selection, but by distant and unknown persons."

The Court of Appeals has not, in its opinion, pointed out any reason why the case at bar is not controlled by the rule that a power not granted, nor necessary to the exercise of a power that is granted, is prohibited by implication, and, in view of the fact that the law has expressly granted the power to these associations to voluntarily liquidate through their own officers, and power to the Comptroller to compel liquidation by the appointment of a receiver, the power attempted to be exercised in this case is as clearly prohibited by implication as in any of the cases cited.

By the denial of this power, the association is not held to be helpless and incapable of an act of duty to creditors and shareholders, as is suggested in the opinion of the Court of Appeals. If, as is said in that opinion (p. 400), one creditor was merely substituted for many, by the guaranty and agreement in this case, it is not easy to perceive that "any act of duty to creditors" was contemplated by the agreement, and the result of the transaction certainly proves that it was a most unfortunate proceeding for the preservation of the interests of either creditors or shareholders. The powers which the American National was capable of exercising, as an act of duty to the creditors and shareholders, were the power to itself liquidate its own affairs, and the power to advise the Comptroller of its insolvency and thus have its affairs liquidated. These are the methods prescribed by the law for the discharge of the duty of an insolvent national bank to its creditors and shareholders.

Nor, I respectively think, is it correct to say, as seems to have been assumed in the opinion of the Court of Appeals (p. 399), that the expression, "duly contracted in the ordinary course of its business", quoted herein from the opinion of this court in *Richmond vs. Irons*, is referrable only "to the activities of a going concern", and is without application to a national banking corporation which has become unable to proceed in business. That expression was employed by this court in the case referred to, not to mark the limitation of the powers of a national bank, but to mark the limitation of individual liability of shareholders in such associations under Section 5151. In *Richmond vs. Irons*, and *Schrader vs. Bank*, this court applied the expression to transactions in the name of an insolvent national bank

in actual liquidation, and I do not see any distinction between an act of this character in the name of a bank in actual liquidation and one which is done after insolvency and as the inception of liquidation, the fact being known to both parties. Indeed, insolvency does not seem to be a necessary factor if the transaction be, otherwise, one which is not duly contracted in the ordinary course of the business of the bank. What this court settled in those cases is, that the individual liability of shareholders as fixed by Section 5151, does not extend to obligations created by transactions in the name of a national bank which are not "duly contracted in the ordinary course of its business". Transactions of this character may be entered into by, or in the name of, a bank that is entirely solvent, but if the character of the transaction is known to the other party, shareholders are not individually responsible. Insolvency and inability to proceed in business may contribute to make the transaction one not "duly contracted in the ordinary course of its business", but it is not necessary to the restriction. The limitation of the individual liability of shareholders under section 5151, is found in the intention of Congress, by the interpretation of that section, which is what this court did in the cases cited, and there seems to be no reason for saying that the individual liability of shareholders under this section is subject to different limitations, depending upon the necessities of the corporation. Of course, if the corporation be in actual liquidation its powers are limited to the business of liquidation, and obligations created by its officers must then, in order to continue or subject shareholders to individual liability, be "duly contracted in the ordinary course" of that business. But the same test or limitation of individual liability is applicable if the corporation be solvent, and

also when, being insolvent and unable to proceed in business it proposes to liquidate and close its affairs. In the case at bar, the association was insolvent and unable to proceed in business. It was proposing to liquidate and close its affairs. It had power to go into voluntary liquidation under Sections 5220 and 5221, and the "ordinary course of its business" then was, to liquidate and close its affairs through its own officers and under the control of its own Directors. But instead of doing this, it entered into the agreement and guaranty of December 21, 1895, which, appellant claims, was *ultra vires*, and not "duly contracted in the ordinary course of the business" of the corporation, and created an obligation for which the statute does not make him liable.

IV.

No principle of equity entitles plaintiff or Union National to be subrogated to the rights of depositors and bills payable creditors against the shareholders of the American National.

It is said in the opinion of the Court of Appeals (p. 400):

"Instead of many creditors to be dealt with, it was arranged that there should be one, whose demands should embrace those of all ofthe others. And in considering the relation of the Union National and the complainant, its assignee, to the American National, we need not stop at the three notes which they held. In the same sense that a shareholder may go behind a judgment recovered against his corporation, to show the character of the indebtedness which it represents, so, in a case like the one in hand, may a creditor, holding a note of the bank, show, if necessary, the nature of the debt which is evidenced thereby. In equity the claims

of the complainant and the Union National represent the contracts, debts and engagements' of the American National Bank, for which the shareholders of the latter are responsible, in accordance with the provisions of section 5151 of the Revised Statutes."

The bill is not framed for the support of this proposition and no authority is cited, or argument advanced, for the support of it in the opinion. It seems to *assume* that *all* debts due to depositors and bills payable creditors could have been enforced against shareholders and that plaintiff and Union National Bank are entitled to equitable subrogation

It was held by this court in *Schrader vs. Bank*, 133 U. S. 67, and in *Ward vs. Joslin*, 186 U. S. 142, that a shareholder was not estopped, by a judgment in favor of a creditor and against the corporation, from showing that the debt was one to which the statutory liability of shareholders did not extend. The question in those cases was, whether an adjudication in a suit between the creditor and the corporation, to which the shareholder was not a party and in which the character of the debt and the shareholders individual liability were not litigated, estopped the shareholder, and it was held that it did not. The debt was the *same debt* after judgment against the corporation as before. Before the judgment it was a simple contract debt; afterwards it was evidenced by record. But the obligation of the corporation as evidenced by the judgment was still created by the same facts and circumstances. There was the same creditor, the same debtor, and the same obligation. There was no *novation*—but an adjudication against the corporation. The shareholder was not, in those cases, claiming any right to subrogation, but was standing upon his obligation as created by the law.

There is no parallel between those cases and the case at bar so far as this question is concerned.

There seems to be no reason to doubt that the plaintiff and Union National Bank may go behind the notes and show the true character, and the whole, of the transaction out of which their claims arise. The appellant has done that himself.

But, are the plaintiff and Union National, after showing the whole transaction, entitled to relief based upon the rights of the depositors and bills payable creditors?

There is nothing in the *agreement* which gives them any such right.

The obligation of the American National which is sought to be enforced in this suit in behalf of plaintiff and the Union National, is not the same obligation as those which were due to depositors and bills payable creditors. There has been a complete *novation*—a new party as creditor, upon a new consideration, and upon entirely different terms. The Union National did not enter into the agreement of December 21, 1895, for the *accommodation* of the American National. By this agreement, the Union National got the business of the American National; removed a competitor; received interest amounting to approximately $70,000; got the banking office, furniture and fixtures of the American National, and got one-half of the loss on its own furniture and fixtures and on the lease of its former place of business paid by the American National, and time was extended.

The Union National agreed to *pay* and *extinguish* the debts due from the Americann National to depositors and bills payable creditors and such payment extinguished the individual liability of shareholders for those obligations of the corporation.

The Union National was a *volunteer*; that is, it did not pay these obligations as a surety, or for the protection of any rights of its own, but because it thought it a *profitable* venture.

There was no fraud or deception. The Union National entered into the transaction with its eyes open, with full knowledge of all of the facts, and charged with knowledge of the legal effect of the agreement; and there was no reason, legal or moral, why the shareholders of the American National should not have consented to or acquiesced in the agreement for the very purpose of extinguishing their individual liability. If the agreement had provided expressly for this it would have been valid and binding. Why, if this is the legal effect of it, should its legal effect be defeated by subrogation?

The Union National paid, it is true, the debts of the American National, but I do not see how this raises an equity in its favor to be subrogated to the rights of *creditors* against *shareholders*. One who pays the debt of another, by request of the debtor, may be entitled to be subrogated to the rights of the creditor when there is an *express agreement therefor*, by the debtor or creditor; but in this case, the American National could not by express agreement, have subrogated the Union National to the rights of creditors against its *shareholders*.

The proposition stated in the opinion, however, is not that the case is one of *conventional* subrogation, but subrogation *in equity*. But there is no principle of equity, in the absence of any agreement therefor, which entitles one who has paid a debt by the procurement of the debtor to be subrogated to the rights of the creditor. Every such person is a mere volunteer. In order to in-

voke the principle of equity, he must show that he was already bound and paid under necessity—that he was not in a position to elect whether he would or would not pay, but paid in order to satisfy an obligation, or to protect an interest or right, of his own.

In *Aetna Life Insurance Co. vs. Middleport*, 124 U. S. 534, the Town of Middleport issued bonds to a railroad company. The Insurance Company bought the bonds from the Railroad Company. It turned out that they were issued without authority and the Insurance Company set up a claim to suborgation in equity to alleged rights of the Railroad Company to recover the amount of an appropriation in lieu of which the bonds were illegally issued. At page 548, it is said:

> "But even if the case here could be supposed to come within the rule which requires the *payment* of a debt in order that a party may be subrogated to the rights of the person to whom the debt was paid, the payment in this case was a voluntary interference of the Aetna Company in the transaction. It had no claim against the town of Middleport. It had no interest at hazard which required it to pay this debt. If it had stood off and let the Railroad Company and the town work out their own relations to each other, it could have suffered no harm or loss. There was no obligation on account of which, or reason why, the complainant should have connected itself in any way with this transaction; or have paid its money, except the ordinary desire to make a profit in the purchase of bonds. The fact that the bonds were void, whatever right it may have given against the Railroad Company, gave it no right to proceed upon another contract and another obligation of the town to the Railroad Company."

The opinion also quotes from *Sheldon on Subrogation*, as follows:

> " * * * it (subrogation) is said to be a legal fiction, by force of which an obligation extinguished by a payment made by a third person is treated as

still subsisting for the benefit of this third person, so that by means of it, one creditor is substituted to the rights, remedies and securities of another.* * *. It takes place for the benefit of a person who, being himself a creditor, pays another creditor whose debt is preferred to his by reason of privileges or mortgages, being obliged to make the payment, either as standing in the situation of a surety, or that he may remove a prior incumbrance from the property on which he relies to secure his payment. Subrogation, as a matter of right, independently of agreement, takes place for the benefit of insurers; or of one who, being himself a creditor, has satisfied the lien of a prior creditor; or for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he has purchased; or for a co-obligor, or surety, who has paid the debt which ought, in whole or part, to have been paid by another."

Other cases are cited and quoted from in the opinion.

See also:

Wood vs. Guaranty Trust Company, 128 U. S. 416.

In *Railway Company vs. Wortendyke*, 27 N. J. Eq. 658, it is said:

"It is not sufficient that a person paying the debt of another should do so merely with the understanding on his part that he should be subrogated to the rights of the creditor. Conventional subrogation can only result from an express agreement of the debtor or creditor."

In *Sandford vs. McLean*, 3 Paige 122; 23 Am. Dec. 773-6, it is said:

"It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in place of the creditor, as a matter of course, without any agreement to that effect. In other cases, the demand of the creditor, which is paid with the money of a third person, and

without any agreement that the security shall be assigned or kept on foot for the benefit of such third party, is absolutely extinguished."

The conclusion stated in the opinion of the Court of Appeals is not, under the facts in this case, I believe, supported by any authority or principle whatever. There was not only no express agreement for subrogation, but it is indisputable that the parties to the agreement intended payment and extinguishment of the debts of the American National as fully as if they had been paid by the bank itself, and there is not a single fact found in the case upon which equity decrees subrogation in the absence of express agreement therefor. The Union National assumed the payment of the debts upon a consideration, for its own profit, and not for the protectien of any interest it already had, or for the discharge of any obligation already resting upon it. To apply the doctrine of equitable subrogation to the facts in this case would extend it far beyond its well established limits without any good reason, and merely to relieve the Union National and its assignee against a perfectly fair bargain, but which appears, at least, to have been converted into an unprofitable one by the negligence and bad management with which the Union National performed its agreement to liquidate the assets turned over to it, and would be granting such relief at the expense of shareholders who have the stronger claim to protection.

The appellant although he was elected a director of the American National in 1895, was not present and did not participate in making the agreement of December 21, 1895. That action was taken at a special meeting of the Directors (p. 255), on Saturday evening, and on the following Monday morning the Union National

had moved into the offices of the American National and had taken possession (pp. 154, 184, 192) under the agreement, and the matter had been given publicity. There is no claim that appelant had any knowledge whatever of the transaction or that it was contemplated, until, at least, some days after, when he signed the ratification paper (to be noticed further on), when shareholders were, practically, coerced by the situation into acquiescence. It seems impossible to point out any fact whatever upon which to rest an equity for subrogation to the rights of the creditors whose demands were paid, conceding, for the sake of argument, that all of such creditors could have enforced the satutory liability of shareholders.

V.

The judgments against appellant, in favor of complainant and Union National Bank, can not be sustained on the ground of either estoppel or ratification.

The averments of the amended bill are general and meager upon these questions, and the Circuit Court did not, in its opinion consider them. But the Court of Appeals rested its conclusion upon the ground of ratification.

A paper was introduced in evidence, for complainant, which is in the following words:

"The undersigned, owners of the number of shares of the capital stock of the American NationalBank of Omaha set opposite our respective names, hereby ratify and confirm the action of the directors of the American National Bank of Omaha in entering into and executing a certain agreement between said American National Bank and the Union National Bank of Omaha, a copy of which agreement is hereto attached."

(Here follows the signatures of a number of shareholders with the number of shares held by each, opposite his name, and a copy of the agreement of December 21, 1895. See Exhibit 25, page 277).

This paper was signed by the appellant and some other shareholders, at some time (not definitely proven) after December 21, 1895. But the complainant did not plead it as an estoppel, nor was it delivered to, or acted upon by, the Union National. It seems to have been procured by Kimall for a purpose unexplained in the record, but presumably, from its contents, in order to enable him, if any shareholders complained, to say that the holders of a majority of the capital stock had consented to the arrangement, and thus to justify the directors and himself.

There is not, in anything contained in this paper, or in any other action by shareholders, any ground for holding that any shareholder is estopped to assert that the obligation sought to be enforced in this case is one not within their statutory liability. The record shows nothing whatever done by appeallant, actively or passively, to mislead, or induce the action of, the Union National in entering into the agreement, and this paper is nothing more than consent that what had been done by the directors should bind *the corporation* to the extent of the assets—as the obligation of the bank; because it does not purport, and was not designed, to be anything more. The Union National was not mislead by any act of the appellant or any other shareholder. There was no fraudulent misrepresentation or any suppression of facts, and appellant's denial of individual liability is not inconsistent with his assent to the agreement. He is not repudiating the agreement; but denying his individual liability. The Union National entered into the agreement with its eyes open. It knew the ex-

tent of the authority and powers of the American National and the extent and scope of the individual liability of shareholders, as created by the law. It had no right to act, and it is not even claimed that it did act, upon any belief that the appellant or any shareholder had enlarged that liability. The fact that the corporation is estopped, conceding it to be so, does not affect the individual liability of shareholders, for the statute does not make the shareholders liable for obligations which the corporation has incurred without authority, but which it has become estopped to deny; nor for obligations which shareholders have ratified, but which the law forbids.

In *Ward vs. Joslin*, 186 U. S. 142 this court said (p. 151):

> "If, however, under the state decisions, the corporation would be held estopped from denying the liability, it does not follow that the stockholders must, therefore, be held liable, if the obligation was in fact incurred without authority. In other words, alleged liabilities incurred without authority, and which do not come within the meaning of the word 'dues', as used in the state constitution, can not be properly treated as brought within the scope of that word, simply because the corporation may be so situated as to be estopped from denying their validity."

It is perfectly clear that the paper signed by appellant was not intended to in any way enlarge the individual liability of any shareholder, There is no word in it relating to the subject. Concerning this paper, Mr. Wattles, who was president of the Union National, testified as follows (p. 242):

"Q. Mr. Wattles, how long after December 21, 1895, to your best recollection, was it that you first saw this paper which has been marked Exhibit 25, and last mentioned in your examination in chief?

A. As near as I can recollect, it was a day or two

before the meeting of the stockholders of the American National Bank that I saw the paper.

Q. And that meeting, you think, was February 26, 1896?

A. Yes, sir.

Q. Do you know who got up this paper marked Exhibit 25?

A. Yes sir.

Q. Who?

A. Mr. Kimball.

Q. At whose instance?

A. I do not know.

Q. Did he consult you about it, or you with him, before getting it up?

A. No sir.

Q. How do you know that he got it up?

A. He showed it to me before the meeting of the stockholders of the American, in reply to a question I asked him of the probability of a favorable vote to liquidate the bank. He showed me this paper at that time and said that more than the required amount of stock had approved this action and signified their approval by signing this paper, and he did not think there would be any doubt about the vote at the stockholders meeting.

Q. And was this paper gotten up and signatures procured with a view to ascertaining what the probable result of the meeting would be?

A. I do not think so.

Q. But you did not see it at all until about February 26, 1896?

A. A day or two before that as I recollect it,

Q. And it is your best judgment that it was gotten up and signed a day or two before this meeting?

A. No sir, I think it was gotten up immediately after the transaction was made, and signed during the next week or ten days after the transfer was made.

Q. Why do you think so?

A. From something that Mr. Kimball has said to me in regard to it.

Q. You do not know the date when it was signed by any of these stockholders?

A. No sir, I do not.

The stockholders meeting referred to by the witness was, in fact, held on February 25th instead of February 26th, 1896. There was no other testimony delivered bearing upon this paper, except that which tended to prove the signatures of some of the shareholders.

At the annual meeting of the shareholders held January 14, 1896, there was some informal reference to the agreement of December 21, 1895, but what is produced in evidence is the mere declaration of the person who kept the minutes, of what a few members of the meeting said. (See Exhibit 9, pp. 258-260). There was no action taken which can be said to have been intended to extend the individual liability of the shareholders to obligations for which the statute did not make them liable. It is true, that at this meeting action was taken directing the directors to take action "looking to the liquidation required by law." But this, already shown to have been a mere form, shows no purpose to enlarge the individual liability of shareholders, or of those participating and voting in the affirmative. Besides, the shareholders, as a collective body, have no power to enlarge the individual liability fixed by the statute. That is a matter which can only be effected by the individual action of each shareholder in his own behalf and in such manner as to constitute a contract by him.

There were two more meetings of the shareholders (pp. 264-274), but the subject of individual liability of shareholders was not mentioned, nor was the agreement of December 21, 1895, either mentioned or repudiated.

There were no other acts on the part of the appellant or any shareholder. But it may be conceded, that if the transaction was one which could be ratified, this was done, by the acts or silence of the shareholders, for *the corporation*, and so far as the *obligation of the corporation* is concerned.

It is, however, said in the opinion of the Court of Appeals (p. 398, bottom):

> "At no meeting of the shareholders, so far as the record shows, was there any word of criticism or objection to the transaction with the Union National, except so far as it may be gathered from the mere fact that a small number of shares were voted against the resolution for liquidation. When it is conceded that the Union National was engaged in carrying out its part of the contract, was disbursing its funds in taking up and carrying forward the contracts, debts and engagements of the American National, the duty of the shareholders of the latter in meeting assembled to then repudiate the transaction if they ever desired to do so, was imperative. * * *. Every consideration of equity, good conscience and justice leads to the conclusion that the shareholders should be held to have ratified and approved what was done and what was then being done."

Assuming this to mean that it was the duty of the shareholders to repudiate the agreement of December 21, 1895, in order to avoid individual liability, Is it sound? I will conceds that it was their duty to repudiate the agreement if they wished afterwards to resist or defeat performance *by the corporation*. But is it true that a shareholder must, when the corporation has made an agreement which does not involve him in any individual liability, when no claim is made against him, and when the subject is in no manner brought to his attention, repudiate the agreement of the corporation in order to avoid becoming individually liable? Does his silence, under such circumstances, enlarge the scope of the statute which fixes his individual liability and extend it to obligations not contemplated by the statute, or by the shareholder when he became a member of the association? As already stated, shareholders, as a collective

body, have no power to affect the individual liability by any means whatever. The most formal action upon the subject could not enlarge this statutory liability. Shareholders do not, by becoming members of the corporation, consent to the exercise of any such power. There is no such power in the corporation or in the body of shareholders. Each shareholder by becoming a member of the association consents to the individual liability which is imposed by the statute, but nothing less than his individual consent can enlarge this liability, and if that be given, he is not liable under the statute, but according to the terms of his consent.

The agreement, which it is said was ratified, did not purport to bind shareholders individually. It did not purport to be "duly contracted in the ordinary course of business" of the American National; and it showed on its face that it was *ultra vires*. Shareholders of the American National Bank had less reason to believe that the Union National was acting upon the belief that they were individually liable, than the Union National had to believe that the shareholders were acquiescing in this agreement upon the belief that they were not; and it is entirely incredible that the shareholders would have acquiesced if they had supposed that they were liable.

There was, therefore, nothing in the fact that these meetings were held, or in anything that transpired in the meetings, or at any other time, that made it necessary for the shareholder to repudiate the agreement to guarantee the Union National against loss in order to protect himself against an extension of his individual liability under the statute, to that agreement. The most formal ratification of this agreement by him was no more than consent to an agreement by the corporation, which, because it was not within the statute which de-

termined the individual liability of the shareholders, did not bind him individually—consent that the corporation be bound.

But, if the contention already made that the agreement of December 21, 1895, between the two banks, was *ultra vires* the American National, is sound, it was not the subject of ratification and would not support an action even against the corporation—excepting that, upon principles of estoppel, *the corporation* would be liable for the value of whatever it had actually received and enjoyed.

McCormick vs. Market Bank, 165 U. S. 538.
Central Transportation Co. vs. Pullman Car Co. 139 U. S. 24-51.
California Bank vs. Kennedy, 167 U. S. 362.

The broad doctrine, "that a contract not within the scope of the powers conferred on the corporation can not be made valid by the assent of every one of the shareholders, nor can it, by any partial performance, become the "foundation of a right of action," has been repeatedly approved by this court.

Thomas vs. Railroad Company, 101 U. S. 71-82.
Oregon Railway Co. vs. Oregonian Railway Co 130 U. S. 1-22.
Central Transportation Co. vs. Pulman's Car Co. 139 U. S. 24-56.
Ward vs. Joslin, 186 U. S. 142-151.

In the case last cited it was said by this court:

> "The rule in this court is that a contract made by a corporation beyond the scope of its powers, expressed or implied, can not be enforced, or rendered enforceable, by application of the principle of estoppel."

But the appellant has not sought to defeat the enforcement of the agreement, or of whatever liability may have grown out of it, by either party against the other, and mere ratification of that agreement by a shareholder, however complete, without any agreement for individual liability, would have no further effect than to permit such enforcement.

If the agreement be not *ultra vires* the American National, in the absolute sense, but is, nevertheless, one not "duly contracted in the ordinary course of business", still, no mere ratification of, or acquiescence in, that agreement, would enlarge the scope or effect of the statute which fixes the individual liability of shareholders, or create any liability independently of the statute. Ratification may estop shareholders from setting up the character of the agreement to enjoin or defeat performance or liability on the part of the corporation, but it could not affect a shareholders individual liability. That is created by the statute, not by the agreement of the association, nor by the ratification of such agreement.

As already stated, nothing less than the contract of the shareholder himself can enlarge his statutory liability, and then his liability would be fixed by, and upon the terms of, his contract, not by the statute.

If the obligation is not one which the statute declares shareholders individually liable for, as when *ultra vires*, or when it is "not duly contracted in the ordinary course of business" by the association, no ratification by shareholders will change its character or make it so, or bring it within the statute. As the making of the agreement between the parties does not, because of its character, create any individual liability of shareholders, so mere ratification of the same agreement could not. The inquiry must be directed to the scope and purpose of the

statute which fixes the individual liability, unless, by contract, the shareholder has bound himself for something different, which is not claimed in this case.

It is said in *Richmond vs. Irons*, (121 U. S. 60), that, after a national bank has gone into liquidation, its officers have no authority to transact any business in the name of the bank so as to bind its shareholders, except that which is implied in the duty of liquidation, unless such authority had been expressly conferred by the shareholders. But it is held in that case that the statute imposing individual liability, must be restricted to agreements "duly contracted in the ordinary course of business" by the bank, from which it follows, logically, that the officers can not, *at any time*, before or after the bank has gone into liquidation, transact any business in the name of the bank "so as to bind the shareholders" if the transaction be not "in the ordinary course of business", without authority is "expressly conferred by the shareholders"; that is, not only the authority to transact the business, *but the authority to bind the shareholders must be expressly conferred.* The statute is no more restricted in its meaning or scope after the bank has gone into liquidation than before. It means the same thing before as after liquidation is begun, *viz*: obligations created by the bank in the ordinary course of its business and within its granted powers, the only difference being that a transaction, which, before liquidation is begun, is within the ordinary course of the bank, may not be so afterwards. Congress did not contemplate these associations would ever create any other obligations, and provided for no shareholder's liability in respect to any other than such as are within their granted powers and incurred in the ordinary course of the business for which they were created.

The paper signed by appellant and other shareholders contains nothing in the nature of an agreement, by the shareholders who signed it, to stand individually liable for the obligation of the bank sought to be enforced in this case.

The present situation is due to the fact that the assets of the American National have been frittered away in an unexplained manner, but, apparently, by inaction and negligence in liquidating. Probably the value of them was less than the face value. But that does not affect the liability of shareholders. If that be true, it shows no more, at most, than that an improvident bargain was made. It does not appear that the Union National contemplated individual liability of shareholders; but if it did, it was a misapprehension of legal rights, the consequence of which can not be unloaded upon the shareholders.

Westal W. Morsman

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